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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 72-912

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEVISION RELAY, INC. (ATR) REVISED RATES FOR MICROWAVE SERVICE; TARIFF F.C.C. No. 8, TRANSMITTAL No. 50	Docket No. 19609

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 18, 1972)

BY THE COMMISSION:

1. The Commission has before it (a) Transmittal Letter No. 50 of American Television Relay, Inc. (ATR) and the accompanying revised tariffs filed August 15, 1972 to become effective October 15, 1972; (b) Petitions by Cable Information Services, Inc., Cruces Cable Company, Inc., Cablecom-General Inc., Columbia Cable Systems, Inc. LVO Cable, Inc. and TelePrompter Corporation, customers of ATR, for rejection or suspension of the revised tariffs; and (c) ATR's opposition to the petitions.

2. These revised tariffs constitute a major revision in the carrier's rate structure applicable to the delivery of the signals of four Los Angeles, California independent television stations to CATV customers in the States of California, Arizona, New Mexico and Texas. Although there are some reductions in charges to 3 of the geographical points served by ATR (Gallup, New Mexico; Prescott, Arizona; and Flagstaff, Arizona), the revisions increase the charges to 16 of the remaining points served. These increases vary in amounts ranging up to about 80% in the case of service to Roswell, New Mexico where the increase is from $2800 to $5145 a month. The overall effect of the tariff submission is to increase total charges from $49,923 to $63,443 a month or about 27%.

3. ATR has submitted cost and other supporting data in response to the requirements of Section 61.38 of our rules, including a statement describing ATR's decision to make a re-evaluation of its services and pricing policies in the light of current and future expected market conditions. Among other things, ATR has decided to divide its service points into two geographical zones and to vary the charges not only according to distance but also, in part, by the "basic population" of the areas being served. The revised tariffs reflect the results of ATR's new pricing policies. According to ATR's data, its net income for calendar year 1971 from the service in question was a negative figure of $53,857 and its projected net income for 1972 of $120,702 on a net investment of $2.5 million will yield a return of 4.748% for this service assuming that the rate increases go into effect on October 15, 1972. ATR further projects its return on this service at 9% for 1973, 13.7% for 1974 and 17.7% for 1975.

109-914—72——1

4. Petitioners raise a number of objections to the revised rate structure and to the supporting data and information. They claim, *inter alia*, that ATR's material falls short in that it fails to provide any discussion as to the carrier's cost of capital and fair rate of return; its explanation of the basis of rate making employed is unsatisfactory; and it improperly computes the rates and revenues applicable under its own rate making theory. In its reply, ATR states, among other things, that: the increased rates "are not predicated upon a reasonable rate of return at this time"; that petitioners have misunderstood ATR's explanations of the supporting material; and that any errors in rate calculation which were made will be corrected by appropriate tariff revisions.

5. We are of the opinion that substantial questions are raised concerning the lawfulness of the revised tariffs and that we should designate the revisions for hearing. The increases involved are substantial both collectively and individually; they will contribute to projected returns in the future that, according to ATR will range from 9% in 1973 to 17.7% in 1975; and they are based in part upon novel rate making theories that appear to depart from cost of service including the imposition of charges based upon "*potential* market penetration" but without regard to the "*actual* market development by any particular cable system". [Our italic.] We believe that these questions and those raised by petitioners should be resolved on the basis of an evidentiary hearing record and that we should suspend the effectiveness of the tariff revision for the maximum period specified by Section 204 of the Act and provide for accounting and possible refund to customers affected by the increased charges. Insofar as petitioners request summary rejection of the tariff revisions without hearing, we shall deny that request. Although ATR's supporting data may not supply fully all of the information contemplated by Section 61.38, we believe that the carrier's submission is in substantial compliance with Section 61.38 and that a sufficient showing has been made to warrant our exercising our discretion not to reject but to suspend and order a hearing. ATR will have the burden of proof on the hearing record to justify the increases and petitioners will have reasonable opportunity at hearing to pursue in an appropriate manner their objections to the carrier's proposed rate increases.

6. Accordingly, in view of the foregoing considerations, IT IS ORDERED, That, pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 203, 204, 205, and 403 of the Communications Act of 1934, as amended, an investigation is instituted into the lawfulness of rates contained in American Television Relay, Inc.'s Tariff F.C.C. No. 8, 20th Revised page 14, including cancellations, amendments or reissues thereof;

7. IT IS FURTHER ORDERED, That, pursuant to the provisions of Section 204 of the Communications Act, said 20th Revised page 14 is HEREBY SUSPENDED until January 11, 1973, and American Television Relay, Inc. shall, in the case of all increased charges and until further order of the Commission, keep accurate account of all amounts received by reason of such increase specifying by whom and in whose behalf such amounts were paid; and shall make no changes

in said schedules of charges during the pendency of this investigation without prior approval by the Commission;

8. IT IS FURTHER ORDERED, That, without in any way limiting the scope of the investigation, it shall include consideration of the following:

(1) Whether the charges, classifications, practices, and regulations published in the aforesaid tariffs are or will be unjust and unreasonable within the meaning of section 201(b) of the act;

(2) Whether such charges, classifications, practices, and regulations will, or could be applied to, subject any person or class of persons to unjust or unreasonable discrimination or give any undue or unreasonable preference or prejudice to any person, class of persons, or locality, within the meaning of section 202(a) of the act;

(3) If any of such charges, classifications, practices, and regulations are found to be unlawful, whether the Commission should prescribe charges, classifications, practices, and regulations for the service governed by the tariffs, and if so, what should be prescribed.

9. IT IS FURTHER ORDERED, That, a hearing be held in this proceeding at the Commission's offices in Washington, D.C., at a time to be specified; and that the Administrative Law Judge to be designated to preside at the hearing shall certify the record, without preparation of an initial or recommended decision, and the Chief of the Common Carrier Bureau shall thereafter issue a recommended decision which shall be subject to the submittal of exceptions and requests for oral argument as provided in 47 CFR 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 CFR 1.282; and

10. IT IS FURTHER ORDERED, That, American Television Relay, Inc. IS MADE a party respondent and Cablecom-General Inc., Cable Information Services, Inc., Cruces Cable Company, Inc., Columbia Cable Systems, Inc., LVO Cable, Inc. and Teleprompter Corporation are GRANTED leave to intervene upon filing a notice of intention to appear and participate within 20 days of the release date of this order.

11. IT IS FURTHER ORDERED, That, the aforementioned petitions are GRANTED to the extent indicated above and are otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-942

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. AND THE ASSOCIATED BELL SYSTEM COMPANIES Charges for Interstate Telephone Service Transmittals Nos. 10989 and 11027	Docket No. 19129

MEMORANDUM OPINION AND ORDER

(Adopted October 18, 1972; Released October 26, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. We are considering Tariff Application No. 898 of the American Telephone & Telegraph Company (AT&T), filed September 1, 1972, in which AT&T requests special permission to make certain amendments in tariff schedules that are in issue in this proceeding. In view of the unique circumstances pertaining to this application and its technical nature, some background will be helpful.

2. On November 20, 1970, AT&T filed revised tariff pages to its interstate message toll service tariff (Transmittal No. 10989) which provided for substantial rate increases effective January 19, 1971. These rate increases, according to AT&T, would have increased earnings [1] by about $545 million a year and would have increased the Bell System's overall rate of return to 9.5%. If no action had been taken by us, the tariffs would have gone into effect automatically on the date shown thereon, i.e. January 19, 1971, 47 U.S.C. 203–204. However, we did take action. In a letter to AT&T dated January 12, 1971, we identified some of the questions of lawfulness raised by the tariff submission (e.g. the projected return was substantially in excess of the 7–7½% return previously allowed) and we specifically requested "that the effective date of the tariffs as filed be postponed by your company pending the outcome of an expedited hearing." (See Att. A)

3. AT&T responded by letter of January 13, 1971 (Att. B), and stated that it would postpone the effective date of the tariff pages pending hearing. Accordingly, on January 14, 1971, AT&T filed further revised tariff pages which, in pertinent part, expressly stated that the January 19, 1971 effective date of the pages in question was "postponed in accordance with AT&T's letter to FCC dated January 13, 1971 with respect to Transmittal No. 10989." (See our two Memorandum Opinion and Orders of January 20, 1971 and January 21, 1971

[1] Net earnings before income taxes.

for a more detailed exposition of the background and scope of the entire proceedings herein; 27 F.C.C. 2d 149 et seq.)

4. Although not directly relevant to the question before us, it should be noted that, in addition to the 1970 rate increases that are in issue herein, a schedule of lower rates which was filed pursuant to special permission by us which is now in effect subject to an accounting and refund order, is also in issue in this case. Accordingly, as we stated in our Memorandum Opinion and Order of January 21, 1971, the proceedings herein are:

> to inquire into the justness and reasonableness of the rates *both as originally filed and as modified by the carrier.* (Italic ours.) (27 F.C.C. 2d 154.)

5. Thus, we have before us in this proceeding two sets of rate schedules, one of which has been deferred indefinitely at our request pending the outcome of the hearing and the other of which is in effect on an interim basis. AT&T's application requests that we waive certain of our requirements (Sec. 61.38, 61.58 of our Rules and Paragraph 11 of our February 3, 1972 order in Docket 18128), and allow AT&T to file further revised tariff pages that would do two things: one, cancel the tariff language that states that the effective date of the 1970 tariff pages has been postponed pending hearing thereon; and two, substitute an effective date of September 15, 1972 for the January 19, 1971 date originally shown on such pages. The application further makes clear that, upon granting this request, AT&T assumes that we would then take the following additional step: upon the filing of such further tariff pages bearing the substitute effective date of September 15, 1972, we would act immediately to suspend the substitute effective date for three months. At the end of such 3-month suspension period, i.e. December 15, 1972, the substitute effective date presumably would become operative, if, by that time, we had not rendered our decision herein. However, it is AT&T's stated assumption that we will render our decision and state what revised rates, if any, will be permitted to go into effect, before the end of such 3-month suspension period.

6. AT&T makes clear that its purpose is to accomplish technical compliance with certain provisions in the regulations of the Price Commission. The carrier wants to make sure that, by the time we make our decision on rate of return, we will not only have "suspended" the effective date of the 1970 rates for the 3-month period specified in Sec. 204 of the Act but that such period will have actually run. The reason that this is important to AT&T is that AT&T construes the present Price Commission regulations as requiring such a suspension and the running of the 3-month period before any interim rate increases that we may allow in our rate of return decision could be placed into effect without a delay of at least three months after our decision. Obviously, AT&T wants to avoid any such delay.

7. The pertinent Price Commission regulations are as follows:

> Any interim rate which is authorized by a regulatory agency * * * may not be placed into effect * * * until the regulatory agency has suspended the interim rate for the maximum period allowed by law, and such suspension period has run *unless* * * * [*the interim rate*] *represents a price increase of the same or a lesser amount than a previously filed rate for the same or equivalent service which has been suspended for the maximum period, and that suspension has run;* 6 C.F.R. Sec. 300.307(c)(1). (Italic ours.)

AT&T assumes that to the extent any interim rate increases that we may allow will represent price increases "of the same or lesser amount than" the 1970 tariff increases and that if the latter have been suspended for at least a 3-month period, any such interim rate increases may be put into effect without a 3-month suspension.

8. Objections to AT&T's application have been submitted by the Trial Staff, Commonwealth of Pennsylvania, Secretary of Defense, State of New Jersey, and American Telephone Consumer's Council. Comments by Microwave Communications, Inc. appear to support a grant of the application provided that any rate increase we might allow is distributed "equitably over all services." The United States Independent Telephone Association supports AT&T's application.

9. It is our opinion that the pleadings herein raise three questions that we should resolve: (1) Were the 1970 rate increases "suspended" for the maximum period authorized by law within the meaning of the Price Commission regulations? (2) If not, should these increases be suspended now so that the maximum period could run in whole or in part before our rate of return decision herein?; and (3) If these rates have already been suspended for such maximum period, should they be re-suspended in order to remove any doubt with respect thereto?

10. With respect to the first question, AT&T contends that we have already suspended the 1970 increases within the intendment of the Price Commission regulations. Nevertheless, AT&T suggests that we should allow it to re-file them and then issue an order under Section 204 of the Act, "formalizing the suspension begun in January, 1971" in order to "remove any technical question that might otherwise arise as to whether the action taken with respect to MTS rates in January 1971 constituted a suspension within the meaning of the Price Commission regulations." The Trial Staff contends that we have not suspended the 1970 rate increases; that the Price Commission regulations require that any interim rate increases we may allow must be suspended for three months; and that a grant of the application would be to "impede", "circumvent" or "steal a march on" the Price Commission. USITA states that our action in January, 1971 "more than meets the Price Commission suspension requirements;" and the State of New Jersey suggests that we proceed to issue an order under Section 204 suspending the 1970 tariffs for three months without deciding at this time whether our earlier action in January, 1971 was a suspension within the meaning of the Price Commission regulations. None of the other parties appear to address this particular question.

11. We agree with AT&T's contention that our action of January 12, 1971 requesting AT&T to postpone the effective date of the 1970 tariffs pending the outcome of an expedited hearing, and AT&T's compliance therewith, constituted a "suspension" within the meaning of Section 300.307(c)(1) of the Price Commission regulations. Thus, any interim rate increases that we may allow herein that are the same or less than those in the suspended 1970 tariffs could be put into effect by AT&T after our decision upon such date as we should determine to be appropriate. The letter we sent to AT&T on January 12, 1971 was "by direction of the Commission" and constituted an action by us which, under the circumstances of this case, was clearly authorized by the specific powers given to us under Secs. 4(i), 4(j) and 203(b) of

the Communications Act. We note that no party herein raises any question about our authority to act as we did. The Trial Staff's contention that we did not "suspend" appears to be based primarily upon the fact that we did not expressly proceed under Section 204 of the Act. However, Section 204 of the Act does not constitute our sole and exclusive statutory authority to take action deferring or postponing the effectiveness of tariffs pending hearing. (See, e.g. *In the Matter of AT&T, et al*, Dockets 18128 and 10684, FCC 72-619, released July 19, 1972). In our opinion, the word "suspension" as it appears in the Price Commission's regulations is used in its ordinary meaning (i.e. "deferment" or "postponement") without reference to any particular statutory provisions by which such suspension is effectuated and without regard to the particular kind of agency action, formal or informal, that brings about such suspension. The only specific procedural requirement is that the suspension be for the "maximum period authorized by law." Moreover, it would appear to be of little, if any consequence from the standpoint of the spirit if not the letter, of the Price Commission regulations whether the "suspension" resulted from an edict of the Commission or from a voluntary response by the carrier to a formal request by the Commission. In either event, the effect is the same, particularly in view of the fact that the rate schedule has remained on file and its lawfulness has been the subject of these proceedings.

12. Further, the Trial Staff's contention that we did not suspend also appears to be based upon the claim that, since the 1970 tariffs never became effective, they "have no legal status whatsoever." We believe that this contention is in error. The facts are that the 1970 tariffs are now officially and lawfully on file with us; they were filed pursuant to Section 203 of the Act; they were filed in compliance with Part 61 of our rules applicable thereto, including the submission of supporting cost and other data, the filing of AT&T's case-in-chief, and the giving of actual notice to the public; they have been accepted by us for filing; they bear a published effective date of January 19, 1971, which date has been postponed *pendente lite* by further tariff revisions which were also officially and lawfully filed pursuant to special permission given by us to AT&T on January 12, 1971; and they have been specifically designated for hearing in the proceedings herein.

13. We turn now to the request of AT&T that, even if we have already suspended the 1970 rates, we should re-suspend them under Section 204 of the Act. We appreciate that there may be some substance to AT&T's claim, which we do not now decide, that they would be an "undue hardship" or "gross inequity" if there was to be a delay for a period of three months in the effective date of any interim rate increases we might allow after a lengthy formal proceding concerning the merits thereof. However, we do not believe that we should grant this application. We agree with the Trial Staff that it would be confusing and perhaps misleading to the public for us to grant AT&T an application to re-file substantial rate increases that are already on file but suspended pending a hearing only to have such re-filed rates immediately suspended and set for hearing in which the hearing record is already closed. Moreover, the present suspension is for a period

that runs until we render our decision herein on the merits whereas AT&T's application would attempt to substitute a suspension period under Section 204 that would definitely expire December 15, 1972 after which users would pay higher charges if we had not rendered a decision by then. In addition, if we were to grant the application with the intent of suspending the resubmitted rates for three months under Section 204, substantial question would be raised as to whether we would not be required to re-open the record and initiate further hearings. Insofar as Section 204 is concerned, it appears that any suspension thereunder must be an action that is ancillary to the principal action by the Commission to "enter upon a hearing concerning the lawfulness thereof." 47 U.S.C. 204 AT&T's application does not contemplate that this be done.

14. We believe that AT&T's major objective in filing its application will have been accomplished by our action herein ruling definitely that, as we interpret the Price Commission regulations, the 1970 rates have been suspended for the maximum period and any interim rate increases we allow that are within the parameters of such suspended rates need not be suspended further. This will remove any doubts on this score insofar as this agency is concerned. We believe that, in the meantime, the public interest will be served by maintaining the status quo until we render our decision on the allowable rate of return.

15. Accordingly, in view of the foregoing, AT&T's Tariff Application No. 898 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Attachment A

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554, January 12, 1971.

Attention: MR. DANIEL E. EMERSON, *Vice President.*

(In reply refer to: 9100).

AMERICAN TELEPHONE & TELEGRAPH CO.,
195 Broadway, New York, N.Y. 10007.

GENTLEMEN: This is with reference to the revised tariffs filed by your company providing for increases in rates for your interstate long distance message telecommunications services (MTT) to be effective January 19, 1971. According to the information submitted with such filing, the proposed rate increases are designed by you to produce additional annual revenues of $385 million. This amount, together with your estimate of associated cost savings, will produce $545 million of additional annual net earnings before taxes and a rate of return on your interstate operations of 9½%.

Upon consideration of this matter, the Commission hereby requests that the effective date of the tariffs as filed be postponed by your company pending the outcome of an expedited hearing and, at the same time, grants AT&T special permission to file revised tariffs, to be effective on not less than seven days' notice, providing for increases in MTT rates that will produce additional annual net earnings before income taxes not to exceed $250 million, rather than the $545 million provided by your tariff filing. As more fully discussed below, the Commission intends to conduct an expedited hearing with respect to the lawfulness of such rates, and to require that all collections under such rates be subject to accounting and refund by the carriers. In taking these actions, we have taken into account, among other things, the relationship of your proposed increase to two proceedings:

(1) Our decision of July 5 and September 13, 1967, in Docket No. 16258 which determined on the basis of a comprehensive evidentiary record that an allowable rate of return for your interstate operations was within a range of 7.0 to 7.5%. The rate of return objective (9½%) of the subject revised rates substantially exceeds the upper limits of such range.

(2) The proceedings now in progress in Docket No. 18128, the issues of which call for a determination of appropriate relationships among the level of earnings for each of your several classes of interstate service.

In determining upon the amount of $250 million specified above as acceptable for the revised filing, we have taken into account two principal factors:

(1) That interstate annual revenue requirements will, as of January 1, 1971, be increased by about $130 million as a consequence of the revisions in jurisdictional separations procedures prescribed by this Commission in Docket No. 18866 to be effective on that date.

(2) Known changes which have occurred since the aforementioned 1967 decision in your capital structure and the costs thereof, including specifically the net increase in embedded cost of debt.

This action is not to be construed as Commission approval of the specific rate schedules to be filed pursuant to the above permission nor as an indication of the findings that may be made after investigation and hearings to be instituted pursuant to Section 204 of the Act, to determine the reasonable revenue requirements of the company and the nature of any further rate adjustments, upwards or downwards, that may be justified in the light of such determinations. Nor is it our intention by this action to prejudge the merits of any showing by your company in support of its claim that it requires a rate of return of 9½%. The Commission, as indicated above, will institute an investigation and hearing with respect to the tariff on file and the refiled rates, and invoke the accounting and refund provisions of Section 204 of the Act, so that in all events the public interest will be protected during and through the hearing process. In determining the length of the period of suspension to be ordered under Section 204, we will give due regard, among other factors, to the January 1, 1971, effective date of the revised separations procedures prescribed in Docket 18866, and immediate adverse effects thereof on the company's level of interstate earnings.

In short, the company will be afforded a full opportunity in the hearing to press for the rate adjustments which it believes called for. Other interested persons will be allowed to present their showings, and the Commission will, of course, develop whatever record it believes desirable in the public interest. In addition to the matters of the allowable rate of return, the Commission intends to explore particularly the following issues:

(1) The questions presented as to the justification for recovering the total of any deficiency in interstate revenue requirements from MTT service, to the exclusion of adjustment in rates for other interstate services, as contemplated by the subject tariff filing.

(2) Questions presented as to the representativeness, for rate making purposes, of your current level of operating expenses, with particular reference to the extraordinary increases in the rate of growth in certain classes of such expenses in 1969 and 1970.

(3) The computations which show that the proposed rates would produce $760 million in additional revenues if there were no shrinkage in traffic volumes and no shifts and reclassifications of messages due to changes in users' calling patterns that would result from the increased charges, and your calculation that such anticipated shrinkage, shifts, and reclassifications will reduce the amount of the increased revenues to $385 million, or about 50%. This is also a matter to be explored fully in the hearing process.

It is our intention to proceed with and conclude the aforementioned hearings as expeditiously as feasible (e.g. barring extraordinary developments, within a time frame of six to nine months) and to order the expedition of the current proceedings in Docket No. 18128 so that the determinations made therein with respect to the appropriate relationship among the level of earnings for the several classes of interstate services, including MTT, may be effectively and timely applied to implement the determinations made in the forthcoming rate of return proceeding.

We request the company to inform the Commission within one week whether it will take the actions provided for herein and submit revised tariffs providing

for the above-noted increases. Upon receipt of the company's response, the Commission will proceed promptly to take such action as appropriate, in line with the considerations outlined in this letter.

This letter was adopted by the Commission on January 11, 1971.

BY DIRECTION OF THE COMMISSION,
DEAN BURCH, *Chairman.*

Attachment B

AMERICAN TELEPHONE & TELEGRAPH CO.,
195 Broadway, New York, N.Y. 10007, January 13, 1971,
Area Code 212–393–1000.

D. E. EMERSON, *Vice President.*

The Honorable DEAN BURCH,
Chairman, Federal Communications Commission, 1919 M Street NW., Washington, D.C. 20554

DEAR CHAIRMAN BURCH: In your letter of January 12, 1971, you have requested that AT&T advise the Commission whether AT&T will postpone the effective date of Tariff Filing No. 10989 pending the outcome of expedited proceedings to be completed within six to nine months (barring extraordinary developments), and you have granted special permission to file revised tariffs to produce not more than $250 million in net earnings before income taxes.

The $250 million interim increase proposed by the F.C.C. is far short of what is required under today's economic conditions. However, under all the circumstances set forth by the Commission and with the explicit understanding that the hearing will be expedited, AT&T agrees to postpone the effective date of Tariff Filing No. 10989. In responding to the Commission's proposal, AT&T expressly reserves the right to take such action as may be necessary to protect its position, including the right to establish a new effective date for Tariff Filing No. 10989, if it should develop that the expedition on which the Commission's letter is based cannot be fulfilled. AT&T commits itself to cooperate in every way in expediting the hearings so they may be completed in the shortest time frame possible, namely the six month period mentioned in the Commission's letter, or indeed less. The Company's case in chief was filed November 20, 1970, and the Company is prepared to proceed at once.

In complying with your request, we are doing so on the premise that the expedited hearings will put rate of return at issue first, and that upon determination of this issue by the Commission, appropriate rates will be made effective.

Revised tariffs to provide the additional $250 million will be filed on special permission as permitted by your letter.

Very truly yours,

_____ _____.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

We return to the continuing story of whether Bell, with the help of the FCC, will be successful in getting more profit from the American consumer. I don't like this chapter, or the way the story seems to be coming out, and so I dissent. Whether I can explain what is happening is another question, but I am willing to give it a try in what follows.

In November 1970 Bell filed the largest interstate rate increase they have ever sought from the FCC. The FCC had two basic choices. It could suspend the entire rate increase for three months and hold a hearing on the lawfulness of the increase. During the time of the hearing, which might take years, Bell would be collecting the higher rates after the three months suspension had run, subject to a possible order from the Commission to give the money back if the FCC subsequently found the rates were in fact too high. But Bell would get

nothing for three months from the higher rates.[1] Another choice was for the Commission to strike a bargain with Bell. And that is what happened.

Bell agreed to reduce its rate increase to about half. The FCC agreed to let the rate increase go into effect immediately, to conduct an expedited proceeding that would evaluate the entire rate increase Bell was seeking, and to issue an accounting order in case refunds were indicated. The FCC *requested* ATT to file lower rates under these conditions. Bell agreed, stating that it specifically reserved the right to make the full rate increase effective if it determined it was necessary. Discussion at the time clearly indicated that Bell would be left in about the same position—they would get about as much in increased revenues from an immediate lower rate increase as it would get from the full increase that did not take effect for three months, assuming that a final decision was made in a six-to-nine month time frame. At the end of the time period, Bell would have about as much money either way.

And so the FCC proceeding began and continued roughly on schedule up to August 1971. Then came the Nixon Administration New Economic Policy which threw the schedule into a cocked hat. After a series of events too numerous to recount, the question of what profit rate to allow the Bell System again seems near a decision at the FCC. But two events have affected what happens now, and they are considered in this action.

First, the Price Commission now requires that any rate increase permitted Bell must have been suspended for the full statutory period. That means, if the FCC is to permit higher rates for Bell in a forthcoming decision, Bell will have to file those rates. Those rates will then, under Price Commission rules, have to be suspended for three months before they can go into effect. Bell does not want to have to wait three months after an FCC decision, and the FCC is trying to be accommodating.

Second, the FCC has also decided to stop tariff filings in proceedings where the Commission is trying to make decisions—in effect trying to get the tariffs to hold still long enough to make decisions. Thus, to file a new tariff, Bell needs special permission from the Commission.

And so Bell is here seeking special permission to file the rest of its rate increase now. It tells the FCC to go ahead and suspend it for three months under the statute, thereby complying with the Price Commission rules and permitting any rate increases to be authorized

[1] There is a strong view, discussed at the time in January 1971, which I need not consider now, that the FCC has sufficient general powers under the Communications Act to stop a tariff filing from going into effect without regard to the statutory suspension period while the agency reasonably proceeds to litigate the issues raised by the tariff. It is argued this is true when the effects of the tariff are extraordinary—for example, as in this case, when the rate increase affects every consumer in the nation, and perhaps also because the amount requested is so large as compared with the profit permitted under the agency's last determination of reasonable rate of return. This view underpins the agency's decision in July 1972 to stop tariff filings unless accompanied by special permission—a view Bell did not appeal after losing on reconsideration. It is also possible to argue that the "maximum period authorized by law" under the Price Commission rules means the full power of the FCC to hold up rate increases. This would mean that no increase could go into effect until the FCC has expended its full power to suspend them. That power under this theory would include the power to stop rate increases until Dkt. No. 18128/Dkt. No. 18684 had been concluded, as well as Phase II in Dkt. No. 19129.

subsequently to go into effect at the end of the three months. The Bell request was put out for comment as an act of cosmetology to improve the image of a possible Bell price hike to be granted shortly after the election. This request for permission has been opposed by the major consumer parties to this proceeding, on grounds I find cogent, as apparently the majority does as well, since it here decides not to go the special permission route.

The arguments against granting the special permission are numerous. Suppose for some reason the Commission does not make a final decision within the three month period. The rates would then go into effect with catastrophic effects on consumers and the economy which would be difficult to undo, particularly if the Commission were to decide that none of the rate increase should have been permitted. Secondly, FCC rules require Bell to notify the public and provide detailed backup material justifying a new rate increase. Bell argues that the special permission requested is just the old rate increase. But notice to the public was given in late 1970 to early 1971. Bell's justification was submitted then also. And although there has been a hearing held on the full rate increase, that hearing was closed in August 1971, and the material put in the record since then clearly does not comply with the Commission's rules. So in order to grant the special permission, the Commission would have to waive its major tariff filing rules with almost no rationale for doing so. Thirdly, granting special permission would simply accommodate Bell's interest in meeting the Price Commission requirements as quickly as possible—hardly an appropriate posture for the FCC to take in helping the Price Commission to fight inflation. And finally, the FCC power to suspend rates is an ancillary power connected with the power to set a tariff for hearing. If the Commission suspends the tariff, it must do so when it sets a tariff for hearing. In this case, granting the special permission and suspending the tariff would mean that the record in this case would have to be reopened.

Granting the special permission Bell seeks is not a viable alternative. But this agency is nothing if it is not ingenious. The majority concludes that no special permission was ever needed. The Commission's January 1971 letter *requesting* Bell to postpone its rates now is deemed to be a binding *suspension*, even though Bell specifically reserved the right to terminate the postponement and put the full rate increase into effect—something it would have found it difficult to do after price controls were placed on the economy, and something for which it would require special permission after the Commission's July 1972 order requiring special permission. The majority concludes the Price Commission uses "suspension" to mean "postponement." But why does that agency say "for the maximum period"? The maximum period for a "postponement" is forever. I do not see how a request for a postponement, which Bell agreed to, specifically reserving its right later to refuse the request, can now be termed a legal suspension. Presumably Bell could have filed a new effective date for the full increase within a month after the Commission's January 1971 letter, and if the Commission had not acted, the rates would have become effective. If so, how can the January 1971 letter be a suspension which bars rate effectiveness for the term of the suspension? But now any "request" *has* to

be a "suspension", or else any new rate increase Bell files here has to be suspended for the full statutory period under Price Commission rules. And the majority can't have that.[2]

I would deny the special permission, and hold that if the FCC decides Bell is entitled to higher rates than are now in effect, those rates when filed must be suspended for the statutory period.[3]

STATEMENT OF COMMISSIONERS H. REX LEE, CONCURRING IN PART AND DISSENTING IN PART

The American Telephone and Telegraph Company has requested special permission to resubmit the $545 million interstate rate increase, which it originally filed on November 20, 1970, and which precipitated the proceedings in Docket No. 19129, and to substitute a new effective date (September 15, 1972) for the rate schedules. It has also asked the Commission to suspend immediately such resubmitted rate increases for three months. AT&T candidly concedes that its purpose is to accomplish technical compliance with certain Price Commission regulations, which require that a regulatory agency suspend any interim rate increases for the full statutory period. In other words, if this Commission decides in Phase I (rate of return) of Docket No. 19129 that the Bell System is entitled to rate increases above those now being collected pursuant to an accounting and refund order, AT&T wants to be able to effectuate such increases without the additional delay imposed by Price Commission directives.

While I am somewhat sympathetic with AT&T's present request in light of the Commission's failure to proceed to an early resolution of the rate of return phase of Docket No. 19129,[1] I cannot agree that special permission should be granted, and it is for that reason that I have concurred in the majority's denial of AT&T's application to resubmit its original tariff filing. For one thing, the application for special permission does not include any of the supporting data required by Section 61.38 of the Rules. Furthermore, AT&T has not given proper notice to the public and the Commission of its intention to increase interstate rates, pursuant to the provisions of Section 61.58. The Bell System seeks waiver of our requirements apparently on the theory that the proposed tariff revisions contain material originally filed on November 20, 1970, under Transmittal No. 10989. However, as the Trial Staff points out in its petition to deny the AT&T request, the situation has changed dramatically since 1970 in regard to inflationary pressures, interest rates, traffic trends, cost projections and government intervention, and the data supplied in 1970 is hardly relevant to the increases now proposed, which would result in $300 million more in

[2] There is one other possibility. Price Commission rules permit a rate increase to go into effect without statutory suspension "for emergency reasons, or to prevent an undue hardship or gross inequity." But it is inconceivable that such a finding validly could be made here.

[3] Under these circumstances, the majority might then hold that the hearing requirement had been complied with. My own view, however, is that the FCC must remand this case for rehearing insofar as the hearing was completed prior to the New Economic Policy. See American Telephone and Telegraph Co., FCC 72-662, —— F.C.C. 2d ——, —— (1972).

[1] While I did concur in the decision to schedule a limited reargument of the Phase I issues, I did so only to accommodate the wishes of two of the present Commissioners who were not members of this agency at the time of the initial oral argument in October, 1971.

annual interstate earnings for the Bell System. In addition, the proposed rate increases would all fall on message toll telephone users, but AT&T has made no attempt to show how it intends to implement its earlier proposal to readjust rates for non-MTS services.

It should also be noted that if special permission is granted for the resubmission of rate increases and the Commission's decision in Phase I is delayed beyond the requested three-month suspension period, AT&T's subsequent effectuation of new interstate tariffs could cause great confusion for rate payers and investors who might assume that the increased rates were the result of a Phase I decision. Moreover, if our decision on the rate of return issue is adverse to the Bell System's position and readjustments in interstate rates are required as a result, there could be serious impact on the market value of AT&T common stock, which has witnessed some improvement in recent weeks.

As already indicated, the extraordinary relief requested by AT&T is clearly an attempt to circumvent the impact of recent Price Commission regulations. AT&T undoubtedly feels that a Phase I decision will permit rate levels higher than those now in effect, and it does not want any further delay in the implementation of rate increases after the Commission's decision. But the Bell System's desires run counter to the clear thrust of Price Commission regulations, adopted as part of the President's program to control inflationary pressures in the economy. While AT&T may believe that Price Commission regulations are unfairly applied to the Bell System in light of the voluntary postponement of the effective date of its 1970 tariff filings, the matter is one for Price Commission review. In the meantime, the Commission should make every effort to enforce the spirit and intent of Price Commission directives.[2]

In addition, as the majority points out, if we were to suspend the resubmitted rate increases for three months pursuant to Section 204 of the Communications Act, a substantial question would arise as to whether the record in Docket No. 19129 should be reopened for further hearings. For, it appears that any suspension ordered under Section 204 must be an action that is ancillary to the Commission's designation of a hearing concerning the lawfulness of proposed rate schedules. AT&T's application for special permission does not even contemplate further hearings in Phase I.

Of course, the majority sidesteps the entire issue of the resubmission of 1970 tariff filings by holding that the Commission's action of January 12, 1971, in requesting AT&T to postpone the effective date of its 1970 rate schedules pending the outcome of an expedited hearing constituted a "suspension" within the meaning of Price Commission regulations. Relying on this theory, the majority concludes that any rate increases to be allowed in a Phase I decision that are the same or less than those contained in the 1970 tariff filings can be effectuated immediately by AT&T. I simply cannot agree with such a construction of our 1971 action. Whatever status AT&T's original

[2] Price Commission regulations do permit an immediate implementation of rate increases if "required for emergency reasons or to prevent an undue hardship or gross inequity." However, AT&T's application and the material attached thereto fail to demonstrate that an emergency situation exists or that the elimination of a full suspension is needed to prevent undue hardship or gross inequity. In fact, recent reports of AT&T earnings indicate that the contrary is the case.

tariff schedules now have, it is clear that our informal request of AT&T to postpone the effective date of the rate increases did not amount to a statutory suspension within the meaning of the Communications Act or Price Commission regulations.

For one thing, AT&T, in exchange for a voluntary postponement of the effective date, was granted special permission to file revised tariffs, which would produce additional annual net earnings of $250 million, subject to accounting and refund. Moreover, in responding to the Commission request, AT&T expressly reserved the right to establish a new effective date for its original tariff filing and thereby to terminate any "deferral" or "postponement." If the Commission's action effectively constituted a statutory suspension, AT&T's reservation represented a meaningless gesture. In any event, above and beyond all of the legal niceties mentioned by the majority is the fact that not even the Bell System seriously considered the Commission's 1971 action as a statutory suspension—its application for special permission clearly indicates its interpretation of the Commission action. If AT&T really believed in the majority's position, it could have easily asked for a declaratory ruling to that effect. The point is that the original tariff schedules submitted by AT&T were not suspended by the Commission[3]—their effective date was voluntarily postponed by the Bell System in return for the effectuation of modified rates, which have permitted increased interstate revenues since early 1971.

Since the majority's interpretation is clearly erroneous and only serves to undercut the role of the Price Commission in the implementation of the New Economic Policy, I dissent to that portion of the majority's decision that holds our 1971 action effectively amounted to a statutory suspension. In my own opinion, our common carrier regulation should be fashioned in a way that would assist the current program to control inflationary pressures rather than in an attempt to avoid the applicability of NEP guidelines.

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[3] If our January 12, 1971, action did constitute a "suspension" within the meaning of the Communications Act and the effect thereof was to confirm this agency's power to stop the effectiveness of tariff filings during an investigation into their lawfulness, it could be argued that Price Commission regulations require continuation of such a suspension until all phases of the many inquiries concerning the Bell System have been concluded.

F.C.C. 72R-306

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CHILDRESS BROADCASTING CORP., OF WEST JEFFERSON (WKSK), WEST JEFFERSON, N.C. MOUNTAIN BROADCASTING CORP., BLOWING ROCK, N.C. For Construction Permits	Docket No. 19015 File No. BP-17396 Docket No. 19016 File No. BP-17688

APPEARANCES

Vincent A. Pepper and *Robert J. Buenzle*, on behalf of Childress Broadcasting Corporation of West Jefferson; *Erwin G. Krasnow* and *Theodore A. Shmanda*, on behalf of Mountain Broadcasting Corp.; *John B. Kenkel* and *William M. Barnard*, on behalf of Wilkes Broadcasting Company; and *Charles W. Kelley*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted October 24, 1972; Released October 27, 1972)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. This proceeding involves the application of Childress Broadcasting Corporation of West Jefferson (Childress), licensee of standard broadcast Station WKSK, utilizing 1600 kc, 1 kw, D, at West Jefferson, North Carolina, for modification of facilities to operate daytime with 500 watts power on 580 kc; and the mutually exclusive application of Mountain Broadcasting Corp. (Mountain) for a new daytime standard broadcast station to operate with the same power and on the same frequency at Blowing Rock, North Carolina. On October 2, 1970, the Commission designated the applications for hearing under the following issues:[1]

> 1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WKSK and the availability of other primary aural service to such areas and populations (1 mv/m or greater in the case of FM).
>
> 2. To determine the areas and populations which would receive primary service from Mountain Broadcasting Corp., and the availability of other primary aural service to such areas and populations (1 mv/m or greater in the case of FM).
>
> 3. To determine the source of additional funds required by Mountain Broadcasting Corp., and, in the light thereof, whether Mountain Broadcasting Corp. is financially qualified.

[1] FCC 70-1032, 20 RR 2d 335.

4. To determine the efforts made by the applicants to ascertain the needs and interests of the areas to be served and the means by which they propose to meet those needs and interests.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by Station WKSK would constitute a menace to air navigation.

6. To determine whether the antenna system proposed by WKSK will be able to achieve the minimum efficiency requirements (175 mv/m/kw) of Section 73.189(b)(2)(ii) of the Commission's Rules.

7. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient, and equitable distribution of radio service.

8. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest.

9. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

After designation, the Presiding Judge permitted Wilkes Broadcasting Company (WATA), licensee of standard broadcast Station WATA, Boone, North Carolina, to intervene on the ground that the overlap of WATA's primary contour with Mountain's proposed primary contour might precipitate economic competition between the two stations.[2]

2. On September 2, 1971, Administrative Law Judge Chester F. Naumowicz, Jr., released an Initial Decision (FCC 71D–60), wherein he concluded that each applicant had satisfied the disqualifying issues directed against it, but that under the 307(b) criteria Mountain was entitled to a grant of its application. The proceeding is now before the Review Board on exceptions filed by all the parties.[3] We have reviewed the Initial Decision in light of the exceptions, the arguments of the parties,[4] and our examination of the record. Briefly stated, we do not concur with the Presiding Judge's conclusion that Mountain has satisfied its burden under the *Suburban* issue and, therefore, with his ultimate conclusion that Mountain be awarded a construction permit. In our opinion, for the reasons hereafter stated, Mountain has not shown compliance with several of the requirements of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*,[5] which, considered independently or together, necessitate a

[2] FCC 70M–1508, released November 3, 1970. Previously, the Commission had denied WATA's petition to deny the Mountain application.

[3] Also before the Board are a petition for leave to amend, filed July 18, 1972, by Mountain, and a motion to strike Childress' brief, filed October 7, 1971, by Mountain. In its proposed amendment, Mountain reports the death of one of its stockholders, Roy Howard Boone, and the transfer of Boone's 5000 shares (16.3%) to his estate. Boone was to play no role in the operation of the proposed station; therefore, since this matter will have no substantive effect on the proceeding, Mountain's amendment will be accepted. However, Mountain's motion to strike will be denied. Childress' brief is only two pages over the limit set by Section 1.277(c) of the Commission's Rules and such a *de minimis* violation does not warrant the requested action.

[4] Oral argument was held before a panel of the Review Board on July 26, 1972.

[5] 27 FCC 2d 650, 21 RR 2d 1507 (1971).

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conclusion that Mountain has failed to establish its requisite qualifications necessary to become a Commission licensee. The Presiding Judge's findings of fact and conclusions of law under the issues relating to Childress' basic qualifications, and the remainder of those issues affecting Mountain's basic qualifications adequately reflect the evidence of record and his Decision with respect to these issues will be adopted. However, in view of our determination to deny Mountain's application under the *Suburban* issue, we need not and will not attempt to resolve the Section 307(b) and contingent comparative issues.

3. Question and Answer 11(a) of the *Primer* requires that consultations with community leaders must be conducted by principals, or by prospective or actual management level employees. In the Report and Order adopting the *Primer*, the Commission attempted to define "top-level employees" as "those whose position is high enough in the organization to be an effective voice in the decision-making process". The Commission further stated that the purpose of this requirement is to assure "that a dialogue can be established and maintained between the community and the decision-making personnel of the applicant." If the contacts were not made by top-level employees, the Commission added, "the information that would be gathered would go through a filtering process that might exclude much valuable information."

4. Mountain conducted two community leader surveys, in 1970 and 1971, consisting of interviews with 61 community leaders and 97 persons representing the general public. All except eight of the community leader interviews were conducted by Richard W. Reynolds, who is listed as the secretary and one of four directors of the corporation.[6] However, Reynolds is not among the six stockholders of Mountain. Reynolds, who was a part-time student and employee of the Wilcox Travel Agency when, in January of 1970, he became an officer and director of the applicant, was appointed to these positions over three years after Mountain was formed, just after the proposed *Primer* was released,[7] and shortly before the surveys were conducted. At that time, he had no broadcast experience, nor did he offer any financial assistance to the applicant. For conducting the survey, Reynolds received compensation from the Wilcox Travel Agency and from the applicant. The agency, located in Boone, North Carolina,[8] is owned by Glen W. Wilcox, president, director and 16.3 percent stockholder of Mountain. Mountain did not, in its application or at hearing, specify what position, if any, Reynolds will hold in the operation of the station. The sole mention at hearing of Reynolds' continuing role in the corporation comes from an exchange between Mountain's counsel and Reynolds:

Q. Is it your intention to continue to be employed by Mr. Wilcox both in the travel agency and Mountain Broadcasting Corporation?
A. Yes, it is. (Tr. 369–370.)

[6] At oral argument, counsel for Mountain stated that it was "primarily Mr. Reynolds who planned, executed, evaluated Mountain's entire effort * * *."
[7] The proposed *Primer* was adopted on December 19, 1969 (FCC 69–1402, 20 FCC 2d 880). Question and Answer 11(a) of the proposed *Primer* required that principals, top-level employees or prospective employees conduct the consultations with community leaders.
[8] Boone, North Carolina, population 8,754, is located approximately six miles from Blowing Rock, which has a population of 777 persons.

5. While ordinarily it could be assumed that one who is an officer and director holds appropriate responsibility to conduct a *Suburban* survey, we are of the view that the foregoing facts establish that Mountain's use of Reynolds to conduct its survey does not comport with the requirement that a principal, management-level employee or prospective management-level employee be utilized. Reynolds' position at the Wilcox Travel Agency, his experience (or lack thereof), the timing of his appointment as an officer and director of Mountain, the fact that he was compensated by his regular employer (a principal of the applicant), his failure to participate in any other aspect of corporate affairs, and the failure to specify any of Reynolds' duties at the proposed station are all clearly inconsistent with any assumed responsibility predicated on the fact that Reynolds is an officer and director of the applicant. Moreover, after the foregoing facts were elicited, Mountain made no attempt to introduce evidence to the contrary, *e.g.*, minutes of corporate meetings showing Reynolds' participation in policy making decisions, etc. Under all of the circumstances, we must conclude that Reynolds is not and will not be in a management or policy making role for the proposed station, despite the fact that he is an officer and director, and that he was appointed to these positions solely for the purpose of compliance with the requirements of the *Primer*. It is therefore clear that Mountain did not establish a dialogue between the community and the "decisionmaking" personnel of the applicant, and that it did not comply with Question and Answer 11(a) of the *Primer*.[9]

6. Similarly, Mountain did not comply with Question and Answer 11(b) of the *Primer* which requires that consultations with the general public be supervised by principals, management-level employees or prospective management-level employees. Mountain's survey of the general public consisted of 97 telephone interviews conducted by a college student working under the supervision of Reynolds. Since, as indicated above, Reynolds does not qualify as a principal or top-level employee, and since he was the only supervisor of the survey, it must be concluded that Mountain's survey of the general public is deficient and does not comport with requirements of the *Primer*.

7. Although Mountain's failure to comply with Question and Answer 11(a) and 11(b) of the *Primer* are sufficient grounds, standing alone, to warrant denial of its application, there are other major deficiencies which, even considered without regard to Reynolds' participation, would necessitate an adverse conclusion under the *Suburban* issue. Question and Answer 6 of the *Primer* requires an applicant to ascertain community problems outside the community of license and, if it chooses not to "serve" any "major community" within its proposed service area (if it is no more than 75 miles from its transmitter site), to set forth the reasons therefor. In its Report and Order, the Commission explained that the word "serve" is to be construed in the sense of programming that is responsive to specific community problems. The term "major community", the Commission explained, is relative; as an example, the Commission stated that a community of

[9] The eight interviews conducted by Wilcox (most of which were conducted with Reynolds) are clearly insufficient to comply with the requirements of the *Primer*.

10,000 residents might be considered minor for a station licensed to Los Angeles, but such a community might be a major community for a station licensed to a city of 25,000.

8. Mountain's proposed interference-free contour would encompass an area of 1,950 miles wherein 105,269 persons reside. The primary service area encompasses all or part of seven North Carolina and two Tennessee counties. Blowing Rock, which had a 1970 population of 777 persons, is located mostly in Watauga County, which has a population of 23,404 persons. The City of Boone, North Carolina, population 8,754 persons, is located approximately 6 miles from Blowing Rock. According to Mountain, it proposes to serve "the community of Blowing Rock plus the surrounding area within a radius of 25 miles",[10] which would include 89,743 persons. As a matter of fact, however, Mountain's survey was restricted to seven communities, six of which are located within Watauga County. The applicant proffered no explanation as to why it failed to ascertain the needs of any other community outside of Watauga County, except to urge that no major community had been omitted from its survey efforts.

9. The Board is of the view that Mountain's attempt to justify the fact that it did not survey any community in an area which contains approximately 77 percent of the total population within its interference-free service area by merely asserting that that area contains no major community must be rejected. Although the term major community is, as previously indicated, intended by the Commission to be relative, where, as here, the city of license has a population of less than 800 persons, the unsurveyed area does contain a number of communities,[11] and the vast majority of the persons proposed to be served reside outside the area the applicant did survey, the only reasonable inferences to be drawn are that there are substantial communities within the pertinent contour and that those communities must be considered "major" when compared to Blowing Rock. In any event, under the circumstances here, we believe it was incumbent on Mountain to establish, other than by bare assertion, that the area within its interference-free contour which it chose not to serve contains no major community. It did not do so. Finally, *Greenfield Broadcasting Corp.*, 30 FCC 2d 774, 22 RR 2d 497 (1971), cited by the Broadcast Bureau at oral argument, is not, in our view, applicable here. In that case, the Commission held that an applicant need not "survey each community in the entire service area." There was no indication, however, of precisely how many communities within its proposed service area the applicant did (or did not) attempt to survey, what percentage of the service area was not surveyed, or what the populations were of the various communities involved. Without these facts, we do not believe that the *Greenfield* case can be utilized as precedent here. We conclude that Mountain has not complied with Question and Answer 6 of the *Primer*, and that this non-compliance, standing alone, requires an adverse resolution of the *Suburban* issue specified against the applicant.

10. In addition to the above-described deficiencies, an examination of Mountain's survey efforts reveals various other areas where com-

[10] See footnote 1 to Mountain Exhibit 4, as amended.
[11] See page 1 of Mountain Exhibit 5.

pliance with the *Primer* is, at best, marginal or questionable. While we might not disqualify the applicant for any of these apparent deficiencies standing alone, considered together they reflect the haphazard and casual approach which Mountain utilized in conducting its survey and reinforce our ultimate conclusion that Mountain's application must be denied under the *Suburban* issue. First, although the Commission noted in the designation Order that the applicant did not submit sufficient information to permit a determination as to whether a cross-section of community leaders and the general public has been consulted, Mountain's demographic study remains subject to valid criticism. While a formal study is not necessarily required and there are limitations when studying a small community (Blowing Rock, as previously indicated, has a population of 777 persons), the study must at least sufficiently show the demography of the area to enable the applicant to interview a cross-section of the community and to permit the Commission to determine whether a true cross-section has in fact been interviewed. Mountain's demographic study was prepared by Reynolds who, at hearing, testified that, since he was unable to obtain up-to-date census figures, the information was obtained chiefly from two articles appearing in the local newspaper, the *Boone Democrat*, which contained population figures given to the newspaper by the Census Bureau. The economic activities of Blowing Rock were obtained from a brochure prepared by the Blowing Rock Chamber of Commerce and given out by Wilcox Travel Agency; the governmental activities were obtained from the Blowing Rock Town Clerk. However, no attempt was made to determine the number of businesses in Blowing Rock, the amounts of income or agricultural figures. In addition, Mountain indicates only the general racial and age make-up of Watauga County and not specifically of Blowing Rock, while it shows only the public service and governmental organizations of Blowing Rock and not Watauga County. Finally, we note that the demographic study was made "after the survey was recommenced in 1971", thereby demonstrating that much of respondent's survey was not based on adequate factual information of the community's composition. While this fact alone does not invalidate the study, see *Phil D. Jackson*, 33 FCC 2d 928, 23 RR 2d 1023 (1972), it appears that no re-evaluation of the survey, in light of the new demographic data, was made. And, in any event, as discussed above, the study is simply not sufficiently informative as to the demography of the area.

11. Notwithstanding the demographic study, it appears that Mountain's survey may not have conducted interviews with a representative cross-section of the population. In this connection, we find: (1) no blacks were interviewed in Blowing Rock [12] and one of the two black persons interviewed in Boone was the custodian of the United States Post Office and his only comment on community problems was the "need for great improvement in the major highways in and out of [the] area"; (2) several "community leaders" have no apparent civic or social affiliation but are simply listed by their jobs, *e.g.*, carpenter/painter, brick mason, self-employed painter, druggist, and jewelry

[12] Mountain asserts that Reynolds made a good faith attempt to locate a black citizen in Blowing Rock but was unable to find one.

repairman; (3) only two individuals interviewed were connected with agriculture although the area is chiefly rural; and (4) apparently no one was interviewed who is directly connected with the resort and vacation business, the main business of the area. Further, in the survey of the general public, Mountain has not shown that it has consulted with members of the general public using some method to assure that those consulted are representative of the community as a whole. See, *Tuscarawas Broadcasting Co.*, 37 FR 5973, published March 23, 1972. Thus, from what we can determine, Mountain may have failed to interview community leaders and members of general public representative of a cross-section of the population.

12. Finally, in view of the foregoing, we are unable to judge with any certainty whether Mountain has sufficiently evaluated the ascertained community problems and whether it proposes programming adequate to meet those problems. *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d 749, 23 RR 2d 760 (1972). However, we briefly note that although religious programming was not mentioned in Mountain's evaluation of its ascertainment survey, it plans two daily religious broadcasts and a one-hour Sunday church service program, and, only two general programs which will cover current problems such as better roads, winter employment, and lack of industrial development. Mountain's general statement that it intends to meet ascertained needs with two or three programs lacks the specificity required by the *Primer*.[13] *Cf. Middle Georgia Broadcasting Co.*, 30 FCC 2d 796, 22 RR 2d 524 (1971).

13. In sum, we find that Mountain's survey falls far below Commission standards and, therefore, that its application cannot be granted. Since Childress has satisfied all requisite qualifications issues specified against it, we further conclude grant of its application would serve the public interest.

14. Accordingly, IT IS ORDERED, That the petition for leave to amend, filed July 18, 1972, by Mountain Broadcasting Corp., IS GRANTED; that the record IS REOPENED and the amendment IS ACCEPTED; and that the record IS CLOSED; and

15. IT IS FURTHER ORDERED, That the motion to strike brief in support of exceptions, filed October 7, 1971, by Mountain Broadcasting Corp. IS DENIED; and

16. IT IS FURTHER ORDERED, That the application of Childress Broadcasting Corporation of West Jefferson (BP–17396) IS GRANTED, and the application of Mountain Broadcasting Corp. (BP–17688) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON, *Member, Review Board.*

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[13] Answer 24 of the *Primer* reads, in pertinent part, as follows: ". . . The applicant should give the description, and anticipated time segment, duration and frequency of broadcast of the program or program series, and the community problem or problems which are to be treated by it. One appropriate way would be to list the broadcast matter and, after it, the particular problem or problems the broadcast matter is designed to meet. Statements such as 'programs will be broadcast from time to time to meet community problems,' or 'news, talk and discussion programs will be used to meet community problems,' are clearly insufficient. . . ."

APPENDIX

RULINGS ON EXCEPTIONS TO INITIAL DECISION EXCEPTIONS OF CHILDRESS BROADCASTING CORPORATION OF WEST JEFFERSON (WKSK)

Exception No.	*Ruling*
1	*Denied.* In our view, the Presiding Judge's ruling complained of does not evince abuse of discretion and was not arbitrary or capricious.
2	*Granted.* The maximum number of aural service within Mountain's proposed coverage area is in excess of sixteen rather than "between five and sixteen aural services are now available within Mountain's proposed .5 mv/m contour" as set forth in the Initial Decision.
3	*Denied.* With respect to Childress' *Suburban* survey, the Presiding Judge's findings of fact and conclusions of law adequately reflect the record evidence.
4	*Granted.* A portion of Blowing Rock is located within the boundaries of Caldwell County.
5	*Denied.* Mountain's failure to separately survey that portion of Blowing Rock located in Caldwell County is not, of itself, a violation of the *Primer.* This portion of Blowing Rock appears to include few people and no record evidence indicates that it is so separate from the remainder of the community that it must be surveyed separately.
6	*Granted* to the extent indicated in paragraph 11 of the Decision, and *denied* in all other respects as not supported by the record.
7	*Denied.* The fact that more interviews were conducted in Boone than in Blowing Rock does not necessarily represent a deficiency in Mountain's survey since Boone is located so close to, and is substantially larger than, Blowing Rock.
8, 9	*Granted* to the extent that this information reflects the haphazard approach taken by Mountain in survey efforts, and *denied* in all other respects. We do not agree that the record supports any adverse findings with respect to Mountain's credibility.
10, 11	*Granted* in substance. See paragraphs 4, 5 and 6 of this Decision.
12	*Granted* in substance. See paragraphs 7, 8 and 9 of this Decision.
13, 14, 15, 16	*Granted* to the extent indicated in paragraphs 10 and 11 of the Decision, and *denied* in all other respects as not supported by the record.
17, 18	*Granted* to the extent indicated in paragraph 12 of the Decision, and *denied* in all other respects as not supported by the record.
19*, 26, 27	*Granted* for reasons expressed in the Decision.
19–25	*Denied.* In view of our conclusion under the *Suburban* issue, there is no need to rule on these exceptions, which relate to the 307(b) and contingent comparative issues.

EXCEPTIONS OF MOUNTAIN BROADCASTING CORP.

1	*Denied.* We have concluded that Mountain's survey is improperly restricted to Watauga County and is inconsistent with applicable Commission policy. See paragraphs 7–9 of the Decision.
2	*Granted* to the extent indicated in paragraph 4 of the Decision, and *denied* in all other respects. See paragraphs 4 and 5 of the Decision.

*Childress has two exceptions numbered 19. They have been ruled on in the order in which they appear.

EXCEPTIONS OF WILKES BROADCASTING COMPANY EXCEPTIONS TO FINDINGS

Exception No.	*Ruling*
1	*Granted* in substance. See paragraph 4 of the Decision.
2	*Granted* in substance. See paragraphs 10 and 11 of the Decision.
3, 4, 5	*Granted* to the extent indicated in paragraphs 10, 11 and 12 of this Decision, and *denied* in all other respects as being of no decisional significance.
6	*Granted.* See our ruling on Childress' Exception No. 5.
7	*Denied.* The Presiding Judge adequately defined Mountain's proposed service area, and that portion of the service area it intends to "serve". See paragraphs 8 and 9 of the Decision.

EXCEPTIONS TO CONCLUSIONS

1	*Granted* in substance as set forth in the Decision.

EXCEPTIONS OF THE BROADCAST BUREAU

1	*Denied.* Mountain's engineer testified that the reference to "four" in its exhibit should be changed to "five". Tr. 75–76.
2, 3, 4	*Denied.* In light of our conclusion that Mountain has failed to make the required showing under the *Suburban* issue, these exceptions, which relate to the 307(b) issue, have been mooted.

F.C.C. 71D-60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:	
CHILDRESS BROADCASTING CORP. OF WEST JEFFERSON (WKSK), WEST JEFFERSON, N.C.	Docket No. 19015 File No. BP-17396
MOUNTAIN BROADCASTING CORP., BLOWING ROCK, N.C.	Docket No. 19016 File No. BP-17688
For Construction Permits	

APPEARANCES

Robert J. Buenzle and *Vincent A. Pepper* (Smith, Pepper, Shack and L'Heureux) on behalf of Childress Broadcasting Corporation of West Jefferson; *Erwin G. Krasnow* and *Theordore A. Shmanda* (Kirkland, Ellis, Hodson, Chaffetz, Masters and Rowe) on behalf of Mountain Broadcasting Corporation; *John B. Kenkel* and *William M. Barnard* (Miller, Schroeder and Bankson) on behalf of Wilkes Broadcasting Company; and *Charles W. Kelley* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued August 31, 1971; Released September 2, 1971)

PRELIMINARY STATEMENT

1. By Commission order released October 2, 1970, and Review Board order released January 18, 1971, the above-captioned applications were designated for hearing on the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WKSK and the availability of other primary aural service to such areas and populations (1 mv/m or greater in the case of FM).

2. To determine the areas and populations which would receive primary service from Mountain Broadcasting Corp., and the availability of other primary aural service to such areas and populations (1 mv/m or greater in the case of FM).

3. To determine the source of additional funds required by Mountain Broadcasting Corp., and, in the light thereof, whether Mountain Broadcasting Corp. is financially qualified.

4. To determine the efforts made by the applicants to ascertain the needs and interests of the areas to be served and the means by which they propose to meet those needs and interests.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by Station WKSK would constitute a menace to air navigation.

6. To determine whether the antenna system proposed by WKSK will be able to achieve the minimum efficiency requirements (175 mv/m/kw) of Sec. 73.189(b)(2)(ii) of the Commission's Rules.

7. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient, and equitable distribution of radio service.

8. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest.

9. To determine in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

2. The applicants published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Conferences and hearings were conducted on various dates between November 17, 1970, and June 11, 1971, with the record being closed on the later date. The filing of proposed findings of fact was concluded by August 23, 1971.

Findings of Fact

Issues Nos. 1 and 2: Areas and Populations

3. Childress, which presently operates Station WKSK at West Jefferson, North Carolina, proposes to modify the facility from 1600 kHz, 1 kw, D, Class II to 580 kHz, 500 w, D, Class III. The coverage data are as follows:

Contour	Present		Proposed	
	Area (square mile)	Population	Area (square mile)	Population
0.5 mv/m	366	18,552	1,422	57,328
Interference			6	177
Interference-free			1,416	57,151
Gain			1,050	38,599

4. There would be no loss of WKSK primary service. A minimum of 5 and a maximum of 11 aural services, including a minimum of 2 and a maximum of 9 AM services, are available within the gain area. A third AM service would be brought to 1,094 persons residing in 19 sq. mi., and a fourth such service would be brought to a 72 sq. mi. area wherein 2,556 persons reside.

5. Mountain seeks a new Class III daytime only station at Blowing Rock, North Carolina on 580 kHz, 500w. It proposes the following coverage:

Contour	Area (square miles)	Population
0.5 mv/m	2,200	118,729
Interference	250	13,460
Interference-free	1,950	105,269

Between five and sixteen aural services are now available within Mountain's proposed 0.5 mv/m contour. In the town of Blowing Rock itself six to seven non-local aural services are presently available.

Issue No. 3: Financial Qualification

6. Mountain will need $92,615 to build its station and operate it for one year. The total is broken down:

Equipment down payment	$7,625
First year equipment payments	8,140
Land rental	500
Remodeling building	1,000
Bank Loan repayments	14,600
Professional Fees	20,000
Pre-operation costs	3,000
Contingencies	2,750
Working capital	35,000

7. To meet these costs Mountain has available $106,395.46, itemized as follows:

Loan from Gautney and Jones	$40,000
Loan from Northwestern Bank of Boone	48,000
Deferred engineering fees	2,900
Prepaid expenses	15,209.21
Cash	285.25

Messrs. Gautney and Jones, each of whom is a 17.74% stockholder of Mountain, established their ability to loan the applicant $40,000 by showing a loan commitment in that amount to them for that purpose from the Union Trust Company of the District of Columbia.

Issue No. 4: Community Needs Ascertainment

8. Childress surveyed its service area in 1970 and again in May, 1971. The 1970 survey suffers from an unusual handicap. At the time Childress was relying on an M–3 prediction of its contours, and conducted its survey on that basis. Subsequently, actual conductivity was determined through measurements to be substantially less than indicated by M–3. As a result, Childress' predicted contours were drawn in, and several of its survey contacts who resided within its predicted M–3 contour were found to reside outside its predicted contour based on measurements. The question presented is whether these contacts should be considered in determining compliance with the Commission's community needs ascertainment standards.

9. In the Examiner's opinion, these contacts should not be excluded. They were made in good faith reliance that the surveyor was operating within the applicant's predicted primary service contour. But for the fortuitous intervention of the subsequent measurements, all concerned would have relied on the information in harmless ignorance of its deficiency, and Childress would have received full credit for all of its efforts. Of even more importance is the fact that this record discloses the area involved to be almost entirely rural, consisting of farm and wood land, cross-roads settlements, and a few small towns. The population is isolated from each other, yet interwoven in an essentially homogeneous region. It would be pursuing logic beyond reality for the Examiner to hold that one man may be presumed to be aware of the area's needs because he lives within the predicted contour, but that no such presumption applies to his neighbor a mile down the road because he is outside the hypothetical 0.5 mv/m border. Hence, all of the Childress contacts will be accorded equal weight in this Initial Decision.

10. The 1970 survey was conducted by Mr. Jan C. Caddell, General Manager of WKSK, and William S. Lewis, Jr., the station's program director. A total of 33 community leaders and 39 randomly selected citizens were interviewed. The contacts were scattered throughout what

Childress than understood to be its gain area. The community leaders selected represented a diverse spectrum of organizations throughout the area.

11. The 1971 survey was conducted by Caddell, L. Clay Denny, WKSK Sales Manager, and Robert Marsh, Chief Engineer. Six community leaders were interviewed and 24 additional random contacts were made with citizens. Again, the interviews were both geographically and organizationally diverse throughout the area.

12. Virtually all of the demographic data presented by Childress related to the towns of Jefferson and West Jefferson, North Carolina rather than to the gain area itself. Childress contended that this was reasonable since the gain area is almost entirely rural and centered on Jefferson/West Jefferson. In these circumstances it is contended that not only is demographic data on the gain area as an isolated entity virtually unobtainable, it is superfluous because the gain area is essentially identical to the Jefferson/West Jefferson core of the region. The argument is both persuasive and unrebutted. It is found that the Childress demographic data fairly describes groupings throughout the region, and demonstrates that it in fact contacted a reasonably representative sampling of the population.

13. The several interviews were tabulated to ascertain the frequency with which various needs and interests had been cited. It is Childress' intention to present programs upon which these matters can be discussed by local personalities knowledgeable on the matters. In addition regular program series will be devoted to such matters of continuing interest as agriculture and education.

14. In 1970 and 1971 Mountain conducted interviews with 61 individuals residing in Blowing Rock and portions of the surrounding area. Fifty-three of the interviews were conducted by Mr. Richard W. Reynolds, Secretary and Director of Mountain. One was conducted by Glenn W. Wilcox, President and Director of Mountain, and seven were conducted jointly by Reynolds and Wilcox. Mr. Wilcox owns 16.3% of the stock in Mountain, and proposes to be active in the management of the station. However, Reynolds is an employee of the Wilcox travel agency, owns no interest in Mountain, and has no connection with the proposed station other than as officer and director of the applicant corporation.

15. The persons interviewed reside in Blowing Rock, and in other portions of Watauga county in which Blowing Rock is located.[1] No one was interviewed in any of the other six North Carolina and two Tennessee counties lying in whole or in part within the station's primary service contour.[2] The explanation for this appears to lie in a May 24, 1971 amendment to the Mountain application wherein it was stated that the applicant proposed to serve Blowing Rock and six other listed Watauga county communities. The record provides no reason why Mountain does not intend to serve other areas and populations within its primary service contour.

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[1] Blowing Rock is located on the southern border of Watauga county, and a small portion of the town may lap over into adjoining Caldwell county. The record is not clear on the point.

[2] Of the 105,269 persons noted at par. 5, *supra*, as residing within Mountain's interference-free primary service contour, 23,404 (22%) reside in Watauga county.

16. The demographic information was obtained by Mr. Reynolds. At the time he was a part-time student at Appalachian State University and attempted to secure 1970 census data from the school library, but none was available. He considered the 1960 census data too out-of-date to be useful. Hence, he relied on partial 1970 census data obtained from a local newspaper article and, information obtained from the Blowing Rock Chamber of Commerce.[3]

17. The selection of community leaders to be interviewed was made after consultation with communications counsel as to compliance with the Commission then-recent Primer, although on-the-spot additions were made when an interviewee suggested another person he thought might be especially knowledgeable. Those interviewed included holders of governmental positions, educators, agriculturists, business and professional men, members of racial minorities, young people, religious leaders, and representatives of various clubs and organizations. In addition, 97 random telephone interviews were conducted by a young woman employed exclusively for that purpose.

18. The interviews were tabulated, and a listing was prepared of the most commonly mentioned problems. A total of fourteen programs are proposed whereon matters related to community needs will be aired.

Issue No. 5: Air Hazard

19. On November 19, 1970, the Federal Aviation Administration issued a "determination of No Hazard" with respect to the proposed Childress tower.

Issue No. 6: Antenna Efficiency

20. On May 14, 1971, Childress amended its application to specify a ground system of 120 #10 copper wire radials, each 425 feet long and buried 6 inches. A 24-foot square copper ground screen would be placed about the base of the tower with each radial wire banded to the outer periphery thereof. According to Figure 8 of Rule 7.3190, an effective field of 180 mv/m for one kilowatt power is to be expected from this ground system when used with the 303 foot radiator proposed. Hence, the proposed operation would meet the 175 mv/m/kw minimum specified by Rule 73.189(b)(2)(ii).

Issue 7: 307(b)

21. Childress introduced a 307(b) exhibit devoted mainly to the characteristics of its city of license, West Jefferson, North Carolina. Since the Childress station is already operating in that city, and will continue to operate irrespective of whether Childress' instant application is granted, the outcome of this proceeding cannot affect either the transmission or reception needs of West Jefferson itself. Consequently, the characteristics and needs of West Jefferson proper are irrelevant to the 307(b) issue, and no findings thereon will be made. Other than the statistical data contained at paragraphs 3 and 4, *supra*, and the opinions obtained by Childress during its community needs survey, the record contains no information bearing on the 307(b) status of Childress' gain area.

[3] Part of the information was obtained orally from an employee of the Chamber, and part from a brochure put out by the travel agency where Reynolds worked which contains data obtained from the Chamber.

22. Blowing Rock, North Carolina, which is not a part of any urbaned area, had a 1970 population of 801 persons. No broadcast stations are assigned to the community. Blowing Rock is primarily a summer resort community containing a 100-room hotel and approximately 20 motels. The town is unincorporated, although it has its own local government and basic municipal services. It has an elementary school, a bank, and several local community organizations, but lacks an extensive retail or professional establishment. It is located some six miles from the town of Boone, North Carolina, which had a 1970 population of 8,754 persons.

Issue No. 8: Congent Comparative

23. The principals of Childress are: James B. Childress, President, Director and 96.2% stockholder; and Theatrice C. Childress, Secretary/Treasurer, Director, and 3.8% stockholder. Mr. Childress also owns 100% of standard broadcast station WMSJ, Sylva, North Carolina, some 185 miles from West Jefferson, and 4% of Station WKRK, Murphy, North Carolina. At the present time Mr. Childress is the full-time supervisor of WMSJ, but proposes to devote approximately 25% of his time to overseeing the operation of the West Jefferson station. This would include regular visits to the station as well as daily attention to the various records of the station's activities. Childress has had over 20 years experience in broadcasting in virtually every non-engineering phase of the business. All of this experience has been gained at North Carolina stations, and he has been very active in civic affairs throughout the state. However, none of his civic involvement appears to have been with organizations specifically identified with West Jefferson.

24. The principals of Mountain are Glen W. Wilcox, President, Director and 16.3% stockholder; Edward G. McGooghan, Vice President, Director and 16.3% stockholder; Richard W. Arcilesi, Treasurer, Director and 16.3% stockholder; Roy H. Boone, 16.3% stockholder; Richard W. Reynolds, Secretary and Director; Carl T. Jones, 17.74% stockholder; and George E. Gautney, 17.74% stockholder. Jones and Gautney are 100% owners of a construction permit for a new FM station at Prince Frederick, Maryland. Mr. Wilcox, who now resides in Asheville, North Carolina, proposes to build a home in the Blowing Rock area, and to devote some 3 days a week to the station. The precise duties he would undertake do not appear in the record. Mountain proposes to install emergency power equipment.

Conclusions

Issue No. 3: Financial

25. Mountain will require a total of $92,615 to put its proposed station on the air and operate it for one year. It will have a total of $106,395 to meet this requirement. The applicant is financially qualified.

Issue No. 4: Community Needs Ascertainment

26. Although neither applicant has demonstrated faultless compliance with the forms prescribed by the Commission's Primer, 20 FCC 2d 880, 27 FCC 2d 650, each has shown substantial compliance. Childress failed to secure demographic information pertaining ex-

clusively to its gain area, and several of its contacts were not within the gain area proper. Nevertheless, it succeeded in showing that its gains were in the sort of rural area with respect to which demographic studies are difficult to find.[4] Secondly, the persons interviewed presented a sufficiently diverse geographical and occupational mix to raise a presumption that they were, in fact, reasonably representative of the population as a whole.

27. Mountain's study presents similar, although not identical, problems. Its survey was limited to its city of license and the county in which that community is located. Since that county contains only 22% of the population within Mountain's primary service contour, a question arises as to whether its survey and service concept are improperly restricted.

28. The February 18, 1971 supplement to the Commission's Primer, 27 FCC 2d 650, indicates that Mountain's actions are not impermissible. The revision therein of the answer to Primer question No. 6 indicates that, outside the city of license, the applicant is only required to ascertain the problems "of the other communities that he undertakes to serve, as set forth in his response to Question 1(a) (2) of Section IV–A or IV–B (of the application)". This is precisely what Mountain has done. While the applicant is also required to make a showing as to why it chooses not to serve major communities within its service contours, this obligation is irrelevant to the present situation since the record indicates that Mountain's service area is essentially rural without any "major" communities.

29. Further difficulty is created by the fact that the bulk of Mountain's surveys were conducted by Mr. Reynolds who will have nothing to do with the operation of the station. This appears to be contrary to the Commission's intent as expressed in the supplement to the Primer, *supra*, at pages 663–4. Nevertheless, Reynolds is Secretary and a director of Mountain and it is indisputable that the incumbency of those offices makes him a "principal" of the corporation. While it seems likely that the Commission intended its reference to "principals" of the applicant in its answer to question 11 of the Primer to mean principals who would be active in the operation of the station, that it is not what it said. Mountain has complied with the literal meaning of the pertinent mandate of the Primer, and no more can be demanded of it. It is concluded that both applicants are in at least minimal compliance with their community needs ascertainment obligations.

Issues 5 and 6: Air Hazard and Antenna Efficiency

30. For the reasons set forth in the findings of fact, it is concluded that the proposed Childress operation would not constitute a hazard to air navigation, and would attain the antenna efficiency required by the Rules.

Issue 7: 307(b)

31. Mountain is entitled to a clear preference on the "transmission" aspect of Sec. 307(b). It would bring a first transmission service to

[4] Formal demography usually presents difficulties to applicants seeking to increase coverage, since gain areas tend to be large donut shaped parcels of land wholly unrelated to the geographic or population units with which demographers or other compilers of statistics usually deal.

Blowing Rock, whereas Childress, which now operates in West Jefferson and will continue to do so no matter how this proceeding is resolved, would not bring any kind of a new transmission service to any community. Traditionally, an applicant proposing a first local service is entitled to a strong 307(b) preference over an opponent which would fail to do so.

32. On the "reception" aspect of 307(b) Mountain also enjoys an advantage since it would bring a new service to 105,269 persons as compared to 38,599 for Childress. Superficially, this preference is diluted by Mountain's stated intentions to concentrate its service on the 23,404 residents of Watauga County. However, this factor lacks genuine significance under the 307(b) issue. The reason for a distinction between the "transmission" and "reception" aspects of Section 307(b) has always been that there is a presumption that the people in the city of license will be receiving a service specifically attuned to their needs and interests whereas population outside that city will merely be receiving a signal of general interest unrelated to their own local situation. Thus, Mountain's determination not to specify that it will serve communities outside Watauga County is merely an affirmative statement of what has heretofore been assumed for purposes of 307(b). Nevertheless, the preference on the "reception" aspects of 307(b) is of less compelling decisional significance since all of the persons to be served by either applicant presently receive at least 5 other aural services, and even if AM alone is considered there are no white or grey areas involved.

33. Thus Mountain is entitled to a significant preference on the "transmission" aspects of 307(b), and a clear, if less compelling, preference on the "reception" aspects of the statute. Overall, it is entitled to a substantial 307(b) preference.

Issue 8: Comparative

34. The comparative issue is to be reached only if the case cannot be resolved on 307(b). It is the Examiner's opinion that Mountain's 307(b) preference is sufficiently great to permit resolution of this proceeding thereon. Hence, no comparative conclusions will be reached.

35. In summary, each of the applicants has successfully met those issues which go to their basic qualifications, and either could be granted. However, Mountain is entitled to a distinct 307(b) preference, and is to be preferred on the basis thereof. It is, therefore, concluded that the public interest would be served by a grant of the Mountain application.

Accordingly, IT IS ORDERED, That, unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, the application of Mountain Broadcasting Corporation, IS GRANTED, and the application of Childress Broadcasting Corporation of West Jefferson, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, Jr., *Hearing Examiner.*

F.C.C. 72-928

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Applications of	
EASTERN BROADCASTING CO., HARLAN, KY. REQUESTS: 1470 kHz, 1 kW, DAY For Construction Permit	Docket No. 19614 File No. BP-17817
RADIO HARLAN, INC. (WHLN), HARLAN, KY. HAS: 1410 kHz, 5 kW, DAY For Renewal of License	Docket No. 19615 File No. BR-1129

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 18, 1972)

BY THE COMMISSION:

1. The Commission has before it for consideration (i) the application of Eastern Broadcasting Company for a construction permit; (ii) the application of Radio Harlan, Inc., for renewal of license; (iii) a petition to deny the application of Eastern Broadcasting Company filed by Radio Harlan, Inc., licensee of station WHLN, Harlan, Kentucky; (iv) pleadings in opposition, reply, and supplement thereto; (v) a petition to deny the renewal of Radio Harlan, Inc., and other further relief filed by Eastern Broadcasting Company; and (vi) pleadings in opposition and reply thereto.

2. Radio Harlan, licensee of station WHLN, Harlan, Kentucky, has filed a petition to deny the application of Eastern Broadcasting Corporation raising a *Carroll*[1] issue, questioning the applicant's character, and alleging deficiencies in the applicant's financial plan and community survey. The petitioner claims standing as a party in interest on the grounds that as a licensee of Harlan's only existing station, it would suffer substantial economic injury should the applicant's proposal be granted. The Commission finds the petitioner does have standing within the meaning of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 9 RR 2008 (1940).

3. In its petition to deny, WHLN contends that a grant of Eastern's application would result in a substantial loss of revenue which would necessitate severe curtailment in its public affairs programming and reductions in its staff. In seeking to raise a *Carroll* issue, WHLN provides a substantial amount of information and economic data in its attempt to meet the pleading requirements set out in *Folkways Broadcasting Company, Inc.* v. *FCC*, 126 U.S. App. D.C. 123, 275, F.2d 299 (1967), and *WLVA, Incorporated* v. *FCC*, —— U.S. App. D.C. ——, 23 RR 2d 2081 (January 4, 1972).

[1] *Carroll Broadcasting Company* v. *FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 RR 2066 (1958).

109-014—72——3

4. WHLN characterizes the Harlan area as a "thin market" with a declining population and a faltering economy. It attributes much of this decline to the continual ebb of Harlan County's chief employer, the coal industry.[2] The 1970 census tabulation shows that since 1960, the populations of Harlan County and Harlan have decreased from 51,107 to 37,510 persons (26.9 percent drop) and 4,177 to 3,318 persons (20.6 percent drop), respectively. WHLN also points out that unemployment is high (9.4 percent), and the average family income low.[3] Moreover, the Harlan area has an "unusually" high number of families substantially dependent upon financial assistance from governmental agencies. For example, as of December 31, 1971, there were 9,082 social security beneficiaries, and during March 1972, there were 11,318 recipients of food stamps living in Harlan County. WHLN also predicts further decline in the coal industry which will result in further population and economic decline.[4]

5. WHLN also proffers a substantial amount of information in support of its allegation that a grant of the Eastern application would cause economic injury and a net decrease in the amount of public service broadcasting. It estimates the area's total theoretical advertising revenue for all communication media to be $845,000 (2 percent of the total retail sales in Harlan County), which is actively solicited by the *Harlan Daily Enterprise*, station WCPM, Cumberland (Harlan County), Kentucky, the weekly paper in Cumberland, other radio stations [5] located outside the county, and itself.[6] Moreover, the petitioner estimates there are 157 businesses in Harlan County that can reasonably be considered potential advertisers for a radio station. Of these businesses, 56 are regular advertisers on WHLN, 61 are parttime advertisers, and 40 do not advertise despite the station's efforts to solicit their business. It also points out that since 1967, 16 regular and 7 seasonal or parttime advertisers have gone out of business. During the same period only five new accounts have been established with new area businesses. In order to gauge the effect a second station would have on its annual revenues, it surveyed 49 of the station's accounts. It reports that 42 advertisers indicated they would divide their advertising budgets between WHLN and a new station. This splitting, concludes the petitioner, would reduce its annual revenues by $50,000.

[2] In September 1971, there were 2,554 workers in mining and quarrying out of 5,606 industrial workers covered by the Kentucky Unemployment Insurance Law.

[3] The average family income for Harlan County in 1969 was only $4,682, as compared with $7,441 per family for the entire State of Kentucky.

[4] It proffers a letter from Cloyd D. McDowell, President of the Harlan County Coal Operators' Association, that concludes, ". . . unless there is a drastic change in some of the above mentioned adverse conditions that coal mining in this area will be reduced both in manpower and production by as much as fifty per cent (sic) within the next two years."

[5] WANO, Pineville, Kentucky; WSWV, Pennington Gap, Virginia; WMIK, Middlesboro, Kentucky.

[6] WHLN submitted its broadcast revenues for the years 1968 to 1971. It notes, however, the increase in revenues for 1971 was due largely to $4,000 in political advertising:

	1968	1969	1970	1971
Broadcast Revenues	$133,999.75	$135,814.00	$140,120.00	$150,501.00
Broadcast Expenses	128,537.64	129,595.00	133,191.00	140,744.00
Broadcast Income	5,462.71	6,219.00	6,929.00	9,757.00
Employees Full Time	8	9	8	8
Employees Part Time	2	1	2	2

Moreover, it estimates a "substantial portion" of its regional and national accounts ($20,000 per year) would be lost.

6. This substantial reduction in revenue, argues WHLN, would necessitate severe curtailments in its public affairs programming and its staff's involvement in community affairs. Specifically, WHLN claims it would be required to dismiss one parttime and three fulltime employees.[7] Those remaining staff members would then be required to devote most of their time to selling and announcing, thus affording less time for the production of local public affairs programming. Accordingly, WHLN projects that public service announcements would be cut in half,[8] editorials would be reduced in frequency,[9] public affairs programs would be either eliminated or reduced in scope,[10] telephone lines to five local churches for live Sunday broadcasts would be discontinued, and its five remote pickup units would not be fully utilized. Moreover, it asserts that the decrease in public service broadcasting now provided by WHLN will not be matched by the proposed station. It points out that WHLN is presently delivering 7.83 percent of weekly air time for public affairs, 9.40 percent of news programming, and 50 public service announcements per day. On the other hand, Eastern proposes only two percent public service broadcasting and 125 public service announcements per week. Thus, it concludes, the reduction in revenue will cause a net degradation in public service broadcasting.

7. Eastern opposes WHLN's petition to deny raising a *Carroll* issue, and generally argues that the petitioner's description of Harlan's economic condition is outdated and overly dismal in outlook. It reports that current economic indicators show an improved Harlan economy, and, as a result, concludes Harlan is capable of supporting a second radio station. This is documented by three newspaper articles,[11] statements of the condition of the Harlan National Bank,[12] a coal industry analysis,[13] and an affidavit by Harold P. Parsons, Eastern's President. Eastern also points out that WHLN's survey inquiring into the effect of a second radio station in Harlan does not take into consideration the possibility that advertisers may increase their budgets in order to obtain adequate coverage on both stations. Finally, the applicant emphasizes the admission made by WHLN that the station has operated at a profit for the past four years and its advertising revenues have increased annually. In addition, it argues, the Commission should take note that Mary Fox (owner) and James T. Morgan (president and general manager) draw $23,928 and $15,744 per year, respectively, and that other "expenses" exist such as paid up term life insurance and maximum hospitalization coverage for all employees, and expenses

[7] The positions eliminated would be one fulltime engineer ($8,400 per year), one salesman-announcer-news gatherer ($7,200 per year), one clerical assistant ($5,000 per year), and one parttime announcer.

[8] During April 1972, WHLN broadcast a daily average of 55.3 public service announcements.

[9] The petitioner broadcast 81 editorials in April 1972.

[10] The petitioner specifically cites two programs, "Pulse" and "Point of View." In both cases, the petitioner argues it is doubtful the remaining staff would have enough time to produce these shows.

[11] Eastern included two articles published on April 30, 1972, pages 16–b and 16–c, and an article published on July 12, 1972, in *The Harlan Daily Enterprise* supporting its claim that the coal mining industry is viable and growing.

[12] It submitted the bank's statements of condition for 1967, 1969, and 1971, which show its total assets increased from $8,617,822.86 to $15,266,139.69.

[13] *Bulletin* No. 9530, File 155, March 27, 1972, Harlan County Coal Operators' Association.

for civic clubs. If WHLN were to provide the principals with "a little less from the operation" and the employees with fewer benefits, concludes Eastern, there would be no need for WHLN to discontinue any of its public service programming. In any event, Eastern feels its proposed operation would more than compensate for any decrease in WHLN's public broadcasting, if it should occur.

8. In its reply, WHLN takes issue with several allegations made by the applicant. It requests the Commission to take note that *The Harlan Daily Enterprise* articles dated April 30, 1972, were part of a special "Progress" edition published as a public relations vehicle for the various businesses and civic organizations located in the Harlan County area; [14] that the President of the Harlan County Coal Operators' Association has stated opinions directly contrary to that submitted by the applicant concerning the status and prospects of Harlan County's coal industry; that James T. Morgan and WHLN's two salesmen personally interviewed the 49 advertisers selected to ascertain the effect a second station would have on the station's revenues; and that although the governmental financial assistance is increasing, the population is decreasing. Finally, WHLN defends the annual salary paid James T. Morgan, and the "reasonable fringe benefits" provided for all its employees.

9. It is apparent from the various statistics and information before us, the two stations would be competing in a thin market. The populations in Harlan and Harlan County have steadily decreased since 1950,[15] and there appears considerable doubt whether this trend will be reversed. Moreover, WHLN has submitted specific factual data and information indicating it would lose a substantial amount of revenue in the event the Eastern application were granted. Although Eastern questions the extent of the potential losses in revenue and the necessity of some program curtailments indicated by petitioner, we note that the court in *Folkways Broadcasting Company*, 375 F.2d 299 (1967), decreed that:

> * * * At times there might be a knowledge of specific financial loss and its detrimental consequence on programming, but we think a Carroll hearing may not be limited to a case in which preknowledge of the exact economics of the situation is necessarily available. Requiring such precision would eliminate the doctrine as a practical matter.

On the basis of the foregoing, we conclude the petitioner has pleaded sufficient data to raise substantial and material questions of fact concerning the ability of the Harlan area to support another broadcast station without a net degradation of public service broadcasting.

[14] It submitted a form letter sent by Clyde C. Lemar, Jr., President and Publisher of *The Harlan Daily Enterprise*, to the businesses of Harlan County, requesting the letter's recipient to "consider your advertising and *news message*" (emphasis added) for this edition.

[15] See the following table:

Year	Harlan		Harlan County	
	Population	Percent change	Population	Percent change
1940	5,122	18.4	75,275	16.6
1950	4,786	−6.6	71,751	−4.7
1960	4,177	−12.7	51,107	−28.8
1970	3,318	−20.6	37,510	−26.9

WLVA, Incorporated v. *FCC*, —— U.S. App. D.C. ——, 23 RR 2d 2081 (January 4, 1972). Accordingly, we will include a *Carroll* issue in the hearing hereinafter ordered.

10. WHLN also questions Eastern's financial qualifications. In response to the deficiencies raised, Eastern amended its financial section several times. In its most recent showing, Eastern estimates $64,845, will be required to construct and operate for one year without revenue, itemized as follows: down payment on equipment, $4,775; first-year payments on equipment with interest, $5,600; land and building, $4,000; miscellaneous, $1,650; loan repayment with interest, $8,820; and first-year's working capital, $40,000. It proposes to meet these expenses with cash on hand of $20,700, a loan apparently from the Bank of Harlan for $50,000, and deferred credit from the equipment supplier. The balance sheets and bank loan are more than a year old, however, and thus a financial issue will be included to determine whether these funds are still available.

11. Finally, WHLN questions the applicant's ascertainment of community needs and problems. In this regard, it also requests the addition of a misrepresentation issue based upon what it considers Eastern's failure to contact the leaders of some of the organizations listed in its initial community survey. Eastern responded to this allegation by pointing out it did not state that any particular individual was contacted, and submitted affidavits attesting to the fact that some members of the listed organizations were interviewed. After examining all the available information, we conclude the explanation provided by Eastern obviates any question of misrepresentation. However, our examination of Eastern's community survey in light of the *Primer* [16] reveals that several deficiencies exist and, thus, a *Suburban* [17] issue will be included. Specifically, the applicant has not described the methods it employed in contacting the community leaders and members of the general public. It also has not described with sufficient clarity the position and organization of those individuals interviewed as community leaders. As a result of these two deficiencies, we cannot make a final determination that Eastern has sought out and established a dialogue with the leaders of all significant groups and organizations existing within the Harlan area.

12. In its petition to deny, Eastern requests the Commission to deny the WHLN application for renewal of its license, or, in the alternative, hold it in abeyance until the applications can be designated for hearing in a consolidated proceeding, citing *K-Six Television, Inc.*, 2 F.C.C. 2d 1021, 7 RR 2d 128 (1966). WHLN opposes the request and asks the Commission to modify its procedure whereby a *Carroll* petitioner's renewal application is consolidated in hearing with the new proposal. It has not, however, put forth sufficient reasons, if true, for changing Commission procedure. As a result, we affirm the procedure adopted in *K-Six*. In *K-Six*, we held, where an existing licensee raises a *Carroll* issue while an application for renewal of the existing station's license is pending, the public interest requires that the renewal application be designated for hearing in a consolidated proceeding.

[16] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 36 FR 4092, 27 FCC 2d 650 (1970).
[17] *Suburban Broadcasters*, 20 RR 951 (1961).

This procedure is necessary because if it should be found the area cannot support another broadcast station without a net loss of service to the public, the Commission must determine that the limited broadcasting facilities will be operated by the party who will better serve the public interest. If it develops that a comparison is necessary between the renewal application and the new proposal, consolidation of the two applications for hearing at the outset makes possible an earlier determination of which applicant would better serve the public interest. Accordingly, the applications will be consolidated and a contingent comparative issue included.

13. In view of the foregoing, the Commission is unable to make the statutory finding that a grant of either or both of the above-captioned applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding, on the issues set forth below.

14. Accordingly, IT IS ORDERED, That, pursuant to section 309 (e) of the Communications Act of 1934, as amended, the application of Eastern Broadcasting Company, for a construction permit and the application of Radio Harlan, Inc., for renewal of its license for station WHLN, ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the application of Eastern Broadcasting Company:

(a) Whether the commitment by the Bank of Harlan for a $50,000 loan is still available to the applicant;

(b) Whether the applicant corporation and its shareholders, Donald G. Parsons and Harold Parsons, possess adequate current assets to finance the proposed station; and

(c) Whether in light of the evidence adduced pursuant to (a) and (b), above, the applicant is financially qualified.

2. To determine the efforts made by Eastern Broadcasting Company to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

3. To determine whether there are adequate revenues available to support an additional standard broadcast station in the area proposed to be served by Eastern Broadcasting Company without a net loss or degradation of broadcast service to such area.

4. To determine in the event that issue 3, above, is resolved in the negative, whether a grant of the above-captioned application of Eastern Broadcasting Company, or a grant of the above-captioned application of Radio Harlan, Inc., would, on a comparative basis, better serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted.

15. IT IS FURTHER ORDERED, That, the burden of proceeding with the introduction of evidence and the burden of proof with respect to issue 3, above, are hereby placed upon Radio Harlan, Inc.

16. IT IS FURTHER ORDERED, That, the petition of Radio

Harlan, Inc., IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

17. IT IS FURTHER ORDERED, That, the petition of Eastern Broadcasting Company IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants, pursuant to section 1.221 (c) of the Commission rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission rules, give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-873

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
GENERAL ELECTRIC CO.
For waiver of comparable tuning rules
(sec. 1568)

(October 5, 1972)

Mr. D. F. JOHNSTONE,

General Manager, Television Receiver Products Department, General Electric Co., Portsmouth, Va.

DEAR MR. JOHNSTONE: This concerns a petition for waiver of the comparable tuning rules (47 CFR 15.68) filed by General Electric on May 10, 1972 and a supplemental pleading filed on June 26, 1972. The waiver requested would permit combination of a non-remotable General Instrument 70-position UHF detent tuner with a remoted VHF tuner in two television receiver models to be produced during calendar year 1973.

General Electric's position, as stated in its two pleadings and as subsequently clarified and refined in discussions with a company official, may be summarized as follows. The company has not heretofore produced remote control models. Upon deciding to do so, it made arrangements to obtain a six-position motor driven UHF tuner and designed and tooled a new solid state chassis to receive that tuner. Commitments were made to its dealers to furnish a remoted unit. It also planned to use the same tuner in a remote control hospital model which has been designed but not tooled. Equipped with these tuners, both models would have met the requirements of the comparable tuning rules. About 10% of the required tuners were delivered to General Electric. On April 5, 1972, however, the supplier notified GE that further orders for tuners would not be filled. As a result, GE states that it must substantially redesign and retool the two receiver models to accommodate a different tuner. It states that it can redesign to receive the General Instrument tuner by January 1, 1973, but that arrangements (i.e., sourcing, redesign, retooling and testing) to receive a remotable UHF tuner cannot be completed prior to January 1, 1974. A relatively small number of units would be produced during 1973, and it is important to the company to be able to write off redesign costs against a full year's production. General Electric would meet the 40% and 70% percentage of models requirements, effective July 1, 1972 and July 1, 1973 respectively, without counting the two remoted units as complying, and requires a waiver only because these models utilize a new chassis. GE expresses concern that its inability to meet commitments to its dealers would mean a loss of dealers and would adversely affect sales of its entire product line. It stresses that its

position is more difficult than that of receiver manufacturers who have been granted waivers based on the failure of tuner manufacturers to supply tuners of the required quality in sufficient quantity to sustain production, and that here instead GE is faced with a total stoppage of supply and the need to redesign its receiver.

The facts presented show that General Electric planned for compliance in excess of the percentage of model requirements in 1972 and 1973; that it will meet those requirements without counting the remoted models as complying; that a waiver is needed only because the remoted models utilize a new chassis and are therefore "new models" under the rules; that circumstances leading to the waiver request were wholly beyond GE's control; and that the company will be placed at a competitive disadvantage if it is unable to market a remoted model during 1973. While there is reason for doubt that arrangements for use of a remotable UHF tuner cannot be completed prior to January 1, 1974, the company's concern about writing off redesign costs for these low volume models over a full year's production is understandable.

Considering all of the facts, we conclude on balance that GE's petition for waiver should be granted. The most important consideration is that GE is meeting the percentage of model requirements and, having proceeded in good faith and failed for reasons beyond its control, should not be disadvantaged simply because the chassis to be utilized was not made prior to January 1, 1972. The "new model" requirement was adopted because it was considered foolhardy for a manufacturer to go through the costly and time-consuming redesign process and not emerge with a receiver which complied with the regulations. It was not meant to cover a situation in which the manufacturer proceeded in good faith to design a comparable receiver utilizing a new chassis and was frustrated by the tuner manufacturer's failure to deliver the tuners required.

Accordingly, General Electric is hereby authorized to combine a nonremotable 70-position UHF tuner with a remoted VHF tuner in units of two new receiver models produced between January 1, 1973 and December 31, 1973.

Commissioners Robert E. Lee and Reid absent, Commissioner Johnson dissenting.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-944

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of an Application by NEW WORLDS CABLE TV, INC., CAMERON, TEX. For a Certificate of Compliance pursuant to Part 76, Subpart B of the Commission's Rules	CAC-819 (TX249)

MEMORANDUM OPINION AND ORDER

(Adopted October 19, 1972; Released October 27, 1972)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. New Worlds Cable TV, Inc., has applied for a certificate of compliance to begin cable television service at Cameron, Texas, a community located within a smaller television market. The applicant has proposed the carriage of the following signals:

KTBC–TV, Ch. 7, CBS, Austin, Texas
KVUE, Ch. 24, ABC, Austin, Texas
KHFI–TV, Ch. 42, NBC, Austin, Texas
KCEN–TV, Ch. 6, NBC, Temple, Texas
KWTX–TV, Ch. 10, ABC/CBS, Waco, Texas
KCRN–TV, Ch. 9, Educ., San Antonio, Texas
KDTV, Ch. 39, Ind., Dallas, Texas
KTVT, Ch. 11, Ind., Ft. Worth, Texas
KHTV, Ch. 39, Ind., Houston, Texas

This application was amended to add the signal of another independent station, KVRL, Houston, Texas, but this request was subsequently withdrawn.

2. Channel 6, Inc., the licensee of the Temple, Texas station, KCEN–TV, opposes certification of this application. Noting that the signal carriage proposal includes the provision of three distant independent stations, Channel 6, Inc., argues that this request, if granted, would exceed the limitation of § 76.59(b) of the Rules.[1] In reply, New Worlds Cable simply states that a neighboring cable television system, operating in Temple, Texas, has carried three independents for a number of years, and in all fairness, the cable television subscribers of Cameron are entitled to the same measure of television programming.

3. The signal carriage proposal of New Worlds Cable TV is plainly inconsistent with the provisions of § 76.59. Accordingly, we cannot authorize the carriage of three independent television stations in

[1] § 76.59(b) provides, in part, that: "Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks *and of one independent television station . . .*" (emphasis added).

Cameron, Texas. To be sure, our rules permit signals authorized or grandfathered to one system in a community to be carried by other systems in that same community.[2] However, in no wise can it be convincingly argued that Temple and Cameron, Texas are part of the same "community" as contemplated by our rules; in their purview, they share nothing but the same television market. We shall certify the carriage of all but the independent signals,[3] and permit New Worlds Cable TV to select one of these three signals for carriage to Cameron. A certificate of compliance will be issued when New Worlds Cable TV advises the Commission of the signal it wishes to carry.

Accordingly, IT IS ORDERED, That the application for certificate of compliance, filed by New Worlds Cable TV, Inc., IS GRANTED to the extent reflected herein, and otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] See § 76.65 of the Rules and the explanatory text of Paragraph 108 of the *Cable Television Report and Order*, 36 FCC 2d 143, at 185 (1972).

[3] The proposed carriage of the other signals is consistent with § 76.59, inasmuch as these signals place a Grade B contour over Cameron, Texas, or happen to be significantly viewed there. § 76.59(c) specifically permits the carriage of KLRN–TV, a distant educational station.

F.C.C. 72R-300

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of ORANGE COUNTY BROADCASTING, INC., D.B.A. ORANGE COUNTY BROADCASTING CO., ANAHEIM, CALIF., ET AL. For Construction Permit for New Television Broadcast Station	Dockets Nos. 18295, 18297, 18298, 18300 File No. BPCT-4018

MEMORANDUM OPINION AND ORDER

(Adopted October 17, 1972; Released October 19, 1972)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT. BOARD MEMBER NELSON DISSENTING ON THE MERITS AND BECAUSE OF THE EXISTING FINANCIAL ISSUE.

1. The Review Board has before it a petition to enlarge issues in the above captioned proceeding, filed by Golden Orange Broadcasting Company, Inc. (Golden Orange) on April 21, 1972.[1] In its petition, Golden Orange requests the addition of issues concerning abuse of process, Rule 1.65, lack of candor, and character qualifications against Orange Empire. Both the Bureau and Orange Empire oppose the addition of the requested issues.

2. To assist in understanding the instant petition, a chronology of events leading up to its filing would be helpful. This proceeding was designated for hearing by Commission Order, FCC 68-856, released August 30, 1968, 32 FR 12591, published September 5, 1968. In its order, the Commission specified an issue to determine whether Orange Empire would have available a bank loan in the amount of $1,700,000. Orange Empire had attempted to establish its financial qualifications by submitting a letter from Inland Bank of Pomona, California. That letter, dated April 2, 1968, and signed by William H. Asdel, president of the bank, purported to commit the bank to lend Orange Empire $1,700,000. However, Mr. Asdel, in the letter, noted that the amount of the proposed loan was in excess of the bank's legal lending limit but urged that the bank could obtain participation by a corresponding bank with no difficulty when the money was needed. It was this clause which led to the specification of the issue.

3. At a hearing session held on March 5, 1970, Mr. Asdel testified that his bank was prepared to provide the $1,700,000 to Orange Empire. The applicant introduced a letter of commitment identified as Orange Empire's exhibit 1, dated April 2, 1968, and a letter dated February 19,

[1] There is also before the Board for consideration an opposition to the petition to enlarge issues, filed by Orange Empire Broadcasting Company (Orange Empire) on May 30, 1972; comments, filed by the Broadcast Bureau on May 4, 1972; and a reply, filed June 23, 1972, by Golden Orange.

1970, which purported to give more details as to the repayment schedule and rate of interest to be charged. On July 26, 1971, Mr. Asdel, president of Inland Bank, directed a letter to Orange Empire in which he advised that company that Inland Bank would in August be merged with the Bank of California. With respect to Inland's commitments to Orange Empire, Asdel stated:

> I will be a Vice President of the Bank of California. More importantly, I should advise you that the lending limit of the Bank of California is many times the amount of your loan requirements of $1,700,000. In consequence of this fact, all previous references to the lending limit of Inland Bank may be disregarded as applicable.

At a further hearing session held on November 23, 1971, counsel for Orange Empire indicated that counsel for the Broadcast Bureau had suggested to him that in view of the Inland Bank merger with the Bank of California the availability of Orange Empire's loan commitment from Inland Bank should be clarified. Counsel further stated that Mr. Asdel, former president of Inland and now a vice president of the Bank of California, had agreed to supply such a letter. At a further hearing session a letter dated December 15, 1971, and signed by John E. Hayes, vice president and manager of the Bank of California which purported to commit the Bank of California to lend $1,700,000 to Orange Empire was marked for identification as Orange Empire exhibit 17. The exhibit was not, however, offered in evidence since Mr. Hayes was not available to sponsor the exhibit and for cross examination. Counsel for Orange Empire instead requested an extension of time to permit him to produce a new letter which would be properly sponsored by an official of the Bank of California. Counsel for Golden Orange objected to the extension, noting that as early as December 20, he had offered to take the testimony of Hayes by deposition so that the witness would not be required to travel to Washington. This Orange Empire had declined to do. The Presiding Judge denied Golden Orange's objection, and scheduled a further hearing session for February 3, 1972. This session was cancelled by the Judge and further hearing was conducted on March 1, 1972. Prior to that date, counsel for Orange Empire had distributed to counsel for all other parties a letter signed by Mr. Paul Revelle, a vice president of the Bank of California. That letter was identical in every respect, including the date, to the letter formerly offered for identification as exhibit 17, signed by Hayes.

4. On the afternoon of February 29, 1972, counsel for Orange Empire called the Presiding Judge to advise him that Revelle had no real personal knowledge concerning the loan commitment and that he was therefore unable to offer a witness on March 1. At the March 1 hearing, counsel for Orange Empire stated that he had discussed the problem under consideration with Mr. Revelle and had determined that Revelle could only testify of his own personal knowledge that he had been directed by the president of the Bank of California to prepare and sign the letter that bore his signature, and that of his own knowledge the loan commitment had not been considered by the credit committee. In these circumstances, counsel stated, he had concluded that no useful purpose would be served offering Mr. Revelle as a witness and therefore requested another continuance to permit him to

come forward with a suitable witness to establish the financial qualifications of Orange Empire. The Presiding Judge, despite the vociferous objections of counsel for Golden Orange, further continued the proceeding until April 4, admonishing counsel for Orange Empire that in the absence of very unusual circumstances he would be afforded no further extension of time. On April 4, counsel for Orange Empire again appeared before the Presiding Judge and stated that his client had, in view of certain problems with the Bank of California, concluded that its interest would be better served by seeking a loan commitment from another lending agency, that it had undertaken to obtain a new loan commitment, and that it had been assured by high officials of another bank that a letter of commitment would be forthcoming; however, on the preceding Thursday the bank reneged and declined to make the needed commitment. Thus, counsel explained, Orange Empire was without a letter of commitment or a witness; Orange Empire therefore concluded that it would rely on the earlier commitment made by the Bank of California and had requested that Mr. Revelle be available for the April 4 hearing. Counsel stated that he was then advised that because of long standing previous commitments Revelle could not come to Washington during the week of April 3. To support this position, counsel relied upon a telegram from Revelle dated March 30, 1972, to the Presiding Judge wherein Revelle stated that prior commitments precluded his appearance during the week of April 3, and that his present calender would permit no appearances on or after April 26. Counsel then stated that there:

> were some questions which persisted. For example, as to whether and to what extent the Bank of California inherited the prior commitment of Inland Bank to Orange Empire Broadcasting Company.
>
> Also, the Bank of California's loan committee never passed upon the Orange Empire application for loan itself, so in order to remove any of these questions, it was decided late last week that the best route to follow would be to resubmit a broad new loan application to the Bank of California, which is in the process of being done, so that neither the Bank of California nor the applicant will rely in any respect upon the previous commitment from Inland Bank . . .
>
> The applicant at this point has no way of knowing whether the Bank of California will, in fact, grant the loan application, so in order to avoid another problem, in the event they deny the application for a loan, Orange Empire is pursuing three other alternate courses with three other banks.

5. In view of these circumstances, Orange Empire again requested a further hearing to enable it to introduce a suitable loan commitment and an appropriate sponsoring witness. All counsel, except counsel for Golden Orange, who again vociferously opposed the further extension, expressed reluctant consent to the further delay. Despite Golden Orange's objections, the Presiding Judge granted Orange Empire an extension until April 25, 1972. At the April 25 hearing session, Orange Empire offered as its exhibit 18 a letter of commitment from the Wells Fargo Bank purporting to commit that institution to lend $1,700,000 to Orange Empire on the terms and conditions stated in that letter. The exhibit was sponsored by Mr. Walter J. Winrow, vice president and manager of the Santa Ana office of Wells Fargo Bank. After extensive cross examination of Mr. Winrow, that exhibit was received in evidence.

6. Orange Empire contends that this sequence of events establishes misrepresentation, failure to report pertinent facts as required by Sec-

tion 1.65 of the Commission's Rules and a general lack of candor which warrants an issue concerning the character qualifications of Orange Empire to be a licensee of this Commission. In support of this contention, petitioner urges that neither the Presiding Judge nor the parties to this proceeding were aware that there was any question concerning the commitment of the Bank of California to lend $1,700,000 to Orange Empire prior to the hearing session held on April 4. Moreover, Golden Orange argues that had Orange Empire been required to go to hearing on March 1, 1972, it would have been established that the credit committee of the Bank of California had never passed on Orange Empire's application for a loan and that there was a question as to whether or not the Bank of California was obliged to honor Inland Bank's prior commitment. Moreover, petitioner argues, had Orange Empire been required to proceed to hearing on April 4, 1972, or had Mr. Hayes' deposition been taken in February, the same factual information would have been elicited. It further argues that there is nothing in the record to establish that Orange Empire had proceeded in good faith and thus we must conclude that Orange Empire's failure to provide a witness at the time specified constitutes an abuse of commission process.

7. The Review Board agrees with the Broadcast Bureau and with Orange Empire to the extent that this sequence of events, standing alone, does not provide an adequate basis for adding the issues requested by Golden Orange. At each step of this proceeding counsel for Orange Empire appeared to be forthright and presented his arguments to the Presiding Judge who was persuaded of their validity and granted the several continuances requested. Certainly this is not grounds for issues which raise questions as to the integrity of the applicant. However, neither the Presiding Judge, Golden Orange nor the Broadcast Bureau were aware of all of the facts. In its opposition, Orange Empire referred to a letter from Mr. Robert A. Lewis, executive vice president of Orange Empire, under date of December 15, 1971; this letter, addressed to Mr. John E. Hayes, alluded to a conference concerning the matter of the Bank of California's loan commitment to Orange Empire, and reads in pertinent part as follows:

> We, of course, recognize that whatever commitment you thereby inherited is entirely a derivative one and limited to Inland Bank's legal loan limit.
>
> Our pressing problem is that if we do not have by today a bank letter indicating the availability of $1,700,000 in loans to us, we shall no longer remain qualified to pursue our application before the FCC. Recognizing as we do both the inadequacy for credit evaluation purposes of the somewhat outdated paperwork delivered to you last Friday and the virtual impossiblity of your making any meaningful assessment of our credit worthiness between then and now even assuming that our projections and financial statements and those of the prospective guarantors were current, we wish to make the following proposal.
>
> If you will provide us with a letter along the lines of the Union Bank letter of April 11, 1968 addressed to Golden Orange Broadcasting Co., Inc., copy of which was forwarded to you by our counsel's December 13, letter to you, we will release and indemnify you from any and all claims for damages which may hereafter be made against you should we be granted the FCC permit as successful applicant and should a thorough credit evaluation of our current prospects at that time cause you to elect not to make any loan to us. Your acceptance of this proposal shall be evidenced by your delivery to us of the requested letter which, as above indicated, we must have today to remain a qualified applicant.

Mr. Hayes' letter of December 15 (para. 4 *supra*) was apparently in response to the letter from Mr. Lewis quoted above. This correspondence casts the foregoing series of events in a different light. We cannot, at this time, accept the view of Mr. Bruington, local counsel for Orange Empire, as set forth in his letter of May 9, 1972, that the Lewis' letter does no more than restate the California law. The last paragraph of Mr. Lewis' letter appears to request a letter of commitment from the Bank of California with the understanding that if such letter is forthcoming and the bank subsequently decides not to make the loan, Orange Empire will forego any legal redress which might otherwise be available to it. This in turn raises a question as to whether Orange Empire may have undertaken to submit what purported to be a bona fide loan commitment but which was in fact no commitment on the part of the Bank of California. While a legally binding commitment is, or course, unnecessary to establish the availability of a proposed loan, the wording of Mr. Lewis' letter reflects that the applicant may have been attempting to merely obtain evidence of a commitment to satisfy the Commission without any regard for the efficacy of that commitment. To obtain and rely on such a commitment letter would clearly reflect on an applicant's candor and integrity. We accept counsel for Orange Empire's statement that he was not aware of the Lewis letter before April 24, 1972. Nevertheless, Mr. Lewis, executive vice president of Orange Empire and Mr. Bruington, Orange Empire's California counsel, must be presumed to have acted for the corporation. In these circumstances, an issue inquiring into the circumstances surrounding the December 15, 1971, letter sent from the Bank of California, signed by John E. Hayes, vice president, and the effect of the facts so adduced on the qualifications on Orange Empire is appropriate.

8. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed on April 21, 1972, by Golden Orange Broadcasting Company, Inc., IS GRANTED to the extent indicated below, and IS DENIED in all other respects, and that the issues in this proceeding ARE ENLARGED to include the following issues:

> To determine all of the facts and circumstances surrounding the letter from the Bank of California, dated December 15, 1971, and signed by John E. Hayes, vice president and manager, and offered by Orange Empire as its exhibit 16 and the effects of these facts on the basics or comparative qualifications of Orange Empire Broadcasting Company.

9. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issue being added herein SHALL BE on Golden Orange Broadcasting Company, Inc. and the burden of proof SHALL BE on Orange Empire Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-927

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaints of
REPUBLICAN NATIONAL COMMITTEE AGAINST AMERICAN BROADCASTING COMPANIES, INC., COLUMBIA BROADCASTING SYSTEM, INC., NATIONAL BROADCASTING COMPANY, INC.
SOCIALIST LABOR PARTY AGAINST COLUMBIA BROADCASTING SYSTEM, INC., MUTUAL BROADCASTING SYSTEM, INC.
COMMUNIST PARTY, U.S.A., AGAINST COLUMBIA BROADCASTING SYSTEM, INC.

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 13, 1972)

BY THE COMMISSION: COMMISSIONERS REID AND WILEY CONCURRING IN THE RESULT.

1. The Commission has before it (1) the complaint and request for equal time by the Republican National Committee (hereinafter RNC), filed on August 15, 1972, (2) comments of American Broadcasting Companies, Inc. (ABC), Columbia Broadcasting System, Inc. (CBS), and National Broadcasting Company, Inc. (NBC), filed between August 23 and 25, 1972 in opposition to RNC's complaint, (3) RNC's reply to the oppositions of ABC, CBS and NBC filed September 1, 1972, (4) the complaint and request for equal time by the Communist Party, U.S.A., filed on September 1, 1972, (5) the complaint and request for equal time by the Socialist Labor Party dated August 21, 1972, (6) comments of CBS and Mutual Broadcasting System filed between September 6 and 8, 1972 in opposition to the Socialist Labor Party's complaint and (7) the Socialist Labor Party's reply to the opposition of CBS and Mutual Broadcasting System dated September 15, 1972.

SUMMARY OF PLEADINGS

2. On August 5, 1972 at 7:30 EST, the Presidential nominee of the Democratic Party, Senator George McGovern, announced that R. Sargent Shriver was his personal choice to replace Senator Thomas Eagleton as the Democratic Party's Vice Presidential candidate.[1] Senator McGovern's program was approximately sixteen minutes in length and was broadcast live by ABC, CBS, NBC and Mutual Broadcasting System. The Commission received complaints from the Re-

[1] Senator Eagleton was selected by the Democratic Party at its National Convention on July 13, 1972 to be the Democratic Vice Presidential candidate for the 1972 Presidential election. Senator Eagleton withdrew as a candidate on July 31, 1972. At a special meeting of the Democratic National Committee on August 8, 1972, R. Sargent Shriver was chosen by the Committee as the party's candidate for Vice President.

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publican National Committee, the Communist Party, U.S.A., and the Socialist Labor Party requesting comparable or equal opportunity to reply to Senator McGovern. Because the complaints are based on similar facts and in part involve similar issues, they will be considered together.

3. Senator Robert Dole, Chairman of the Republican National Committee, on August 6, 1972 sent telegrams to ABC, CBS and NBC requesting that a Republican spokesman be afforded a comparable opportunity to respond to the August 5 remarks of Senator McGovern.[2] Senator Dole, in his telegram to the networks and in his petition to the Commission, stated that Senator McGovern's speech was largely devoted to a partisan attack against the Republican Administration of President Nixon and in support of political candidates of the Democratic Party in the current campaign, and that the *Zapple* ruling (*Nicholas Zapple*, 23 FCC 2d 707 (1970)), and the *First Report* in Docket 19260, —— F.C.C. 2d ——, 24 RR 2d 1917 (1972) require that a comparable opportunity be given the Republican Party.[3] RNC cites the *First Report*, *supra* at 1928, fn. 11, as stating that *Zapple* is a common sense measure designed to "carry out the Congressional scheme in Section 315" in situations analogous to those explicitly covered by Section 315. RNC contends that the instant case presents one of those analogous situations to which *Zapple* applies. RNC states the following:

> While it [NBC] acknowledged that Section 315 applies to appearances by candidates, there is no indication that the Commission construes this fact to preclude the concurrent applicability of the political broadcast subdoctrine where the situation would warrant it. In regard to Senator McGovern's speech, *bona fide* candidates of other parties may request broadcast time equal to that afforded Senator McGovern, the Democratic Party candidate, unless his appearance falls within one of the exemptions contained in Section 315. However, the Republican candidate has not yet been chosen and cannot take advantage of Section 315. Nevertheless, to suggest that the networks could give unlimited free campaigning time to one candidate up to the point his opponent is chosen and only thereafter treat both alike is an illogical and patently contrary to the public interest as in the Commission's hypothetical situation of a broadcaster affording the RNC free time during the campaign to advance its cause but denying comparable time to the DNC. *First Report*, *supra*, at 1928. Precisely because it is "a common sense distillation of the public interest in certain political broadcast situations," *id.* at 1929, the subdoctrine must also be applied in the instant case to afford response time to a Republican spokesman.

4. RNC also argues that Senator McGovern's speech does not fall within any of the exemptions of Section 315 of the Communications

[2] The Mutual Broadcasting System had agreed to provide 15 minutes to RNC for a response to Senator McGovern's August 5 address.

[3] RNC did not allege that the networks' broadcast of Senator McGovern's August 5 speech violated the fairness doctrine.

Act of 1934, as amended.[4] RNC states that the legislative history of the 1959 amendments to Section 315, which incorporated various exemptions into Section 315, "demonstrates the Congressional concern that these exemptions not be used to permit campaigning free of the equal opportunities requirement of Section 315." RNC states that the Section 315 exemptions were never intended to insulate campaign speeches such as Senator McGovern's August 5th address; that Senator McGovern used only one minute of the sixteen minute broadcast to announce his choice for his Vice Presidential running mate; that he later admitted to news reporters that he had exploited for his political purposes the opportunity given to him by the national networks; that the national networks received a text of the speech in advance and knew that he would exploit the broadcast in order to attack President Nixon; that the admission by Senator McGovern of his purpose to "exploit" his opportunity, the lack of urgency of the message and the fact that the press had knowledge of his new choice for Vice President a day before the broadcast should preclude treatment of the address as a news event. RNC contends that Senator McGovern's speech should not be considered coverage of a bona fide news event (i.e. coverage of a political convention) because "the Democratic Convention had long since been adjourned and the only proceeding in the offing was a special meeting of the Democratic National Committee scheduled for August 8, not a political convention."

5. ABC, CBS and NBC refused RNC's request for a comparable opportunity to reply to Senator McGovern's address. The networks based their refusal on the ground that the Commission's *Zapple* ruling does not apply to appearances by political candidates. CBS and NBC noted that in paragraph 30 of the *First Report*, *supra*, at p. 1927 the Commission stated that the *Zapple* ruling "concerned campaign presentations that did not involve the appearance of a candidate." CBS also argued that Senator McGovern's speech was not analogous to any examples set forth in paragraph 31 of the *First Report*, *supra*, so as to bring Senator McGovern's appearance within the *Zapple* doctrine. ABC stated that any interpretations that would hold *Zapple* applicable to appearances by a political candidate would in effect reinstate the Commission's holding in *Lar Daly*, 26 F.C.C. 715 (1959).[4a] The networks noted that while RNC did not attempt to apply the equal opportunities requirement of Section 315 to Senator McGovern's broadcast, they still considered their coverage of McGovern's speech to be "on-the-spot coverage of bona fide news events." ABC stated:

> [Its] . . . decision to cover Senator McGovern's announcement on August 5 of his choice of a running mate was, in the judgment of ABC News, a bona fide news event of major importance, and

[4] Section 315 states in part:
Appearance by a legally qualified candidate on any—
(1) Bona fide newscast,
(2) Bona fide news interview,
(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
(4) On-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

[4a] That ruling was specifically overruled by the 1959 amendments to Section 315 exempting certain news-type programs from the equal opportunities provision of Section 315.

> one incidental to the covering of the Democratic National Committee on August 8, as a "mini-convention," to select a Vice Presidential nominee to replace Senator Eagleton.

CBS stated that the announcement was an unprecedented news event and not a routine public appearance which did not become less of a bona fide event because it featured a candidate. CBS argued that the fact Senator McGovern may or may not have exploited the broadcast should not be determinative of the legal issues involved, for a news event which is otherwise exempt should not lose its exemption merely because it also advances or detracts from the political fortunes of a candidate. Regarding the RNC charge that possibly only one minute was newsworthy, CBS stated:

> It is not possible in most cases to divide a single event as the complainant suggests might be done here, i.e., one-minute exempt and 15-minutes non-exempt. The political ramifications are too closely intertwined with the news in many instances to permit such a division.

The networks also stated that the speech was a continuation of their coverage of the Democratic Party convention.

6. RNC in reply to the networks stated that the objective of both Section 315 and *Zapple* is "to assure that broadcast media act even-handedly in the political arena," and that the networks will create a damaging political loophole if Senator McGovern's appearance is not held to fall within *Zapple*. RNC stated that in the *First Report* and in early rulings the Commission was focusing on other situations, but nothing contained in any prior decision precludes the relief requested in this case. Further, RNC argues that the networks' "good faith" determination that it would be a news event should not be determinative as to whether it is a bona fide news event and cites *Columbia Broadcasting System, Inc.*, 40 F.C.C. 398 (1969), to support its contention.

7. The Socialist Labor Party (hereinafter SLP) stated that CBS and the Mutual Broadcasting System failed to provide "equal opportunities" to Mr. Louis Fisher, SLP candidate for President, which it alleges arose as a result of the August 5 address by Senator McGovern in violation of Section 315.[5] SLP argued that Senator McGovern's address was not exempt from Section 315 and cited the same general arguments advanced by RNC in its petition. (See paragraph 4, *supra*, which sets forth arguments similar to those of SLP.) SLP also argued that the event lacked bona fide news status because the time and place of the announcement were arranged by the candidate.

8. CBS in rejecting SLP's request and in reply to its complaint stated that its coverage of Senator McGovern's speech was exempt from Section 315 because it was on-the-spot coverage of a bona fide news event. CBS rejected the SLP argument that a majority of the address was campaign rhetoric and reiterated its belief that Senator McGovern's speech was of extraordinary historical significance and "The decision to broadcast Senator McGovern's statement was made solely on the basis of CBS News bona fide news judgment and not for

[5] It should be noted that SLP did not include the ABC and NBC networks in its complaint because it was in the process of negotiating possible appearances for Mr. Fisher on those networks.

the purpose of adding or detracting from his candidacy." CBS also rejected SLP's claim that the bona fide nature of the event was lost because the candidate arranged the time and place of the event, noting that the political conventions which are controlled by the party as to time and place are specifically exempt under Section 315. Mutual Broadcasting System in its reply to SLP stated Mutual does not operate a television network; that Mutual does not own or operate any stations; that it never received a request from the SLP until August 30, 1972; and that a request for equal opportunities must be made within a week of the first prior use. Mutual stated that even if SLP made the request within a week of the first prior use, it still would not have been obligated to provide time because its coverage was exempt under Section 315 in that it was on-the-spot coverage of a bona fide news event.

9. SLP in reply to the opposition of Mutual admitted an error in its complaint which stated that the Mutual Broadcasting System owned and operated RKO General, Inc. and acknowledged that its attempts to notify Mutual within seven days of the first prior use were "misdirected." SLP now argues that its request for equal opportunities, while invalid against Mutual, now appears to be valid against any station owned and operated by RKO General, Inc. SLP in reply to the opposition of CBS again rejects the CBS arguments and contends that the fact Senator McGovern controlled the time and place of the announcement is determinative as to whether it was an exempt program, and in support cites F.C.C. Public Notice of April 26, 1966, Question 27, 40 F.C.C. 395 (1964).

10. The Communist Party, U.S.A., in a complaint against CBS which was similar to the request of the Socialist Labor Party also asked for a comparable opportunity for its Presidential candidate, Mr. Gus Hall, as a result of the August 5 McGovern address.[6] The Communist Party, U.S.A., stated that Mr. Hall is a legally qualified candidate; that nominating petitions in his behalf have been filed in many states; and that his petitions have been certified in Ohio, Colorado and Michigan. The Communist Party, U.S.A., also stated:

> In addition, Mr. Hall should be granted free use of CBS TV facilities based on the fairness doctrine which requires television networks "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

CBS rejected the Communist Party, U.S.A., request for equal time, again on the basis that the address was exempt under Section 315. Regarding the fairness complaint, CBS stated:

> CBS news has covered, and intends to cover, all events during the 1972 Presidential campaign consistent with judgments of newsworthiness and in conformity with its obligations under the fairness doctrine.

[6] The Communist Party, U.S.A., states that ABC and NBC have provided time to it under the fairness doctrine.

DISCUSSION

11. RNC argues that the Commission's *Zapple* ruling and the *First Report*, *supra*, require that a comparable opportunity be given to the Republican Party. It is clear that the resolution of issues regarding the RNC complaint must turn on the applicability of *Zapple* and not on Section 315 considerations. Section 315 of the Communications Act of 1934, as amended, states that if a licensee permits any person who is a legally qualified candidate for any public office to use a broadcasting station, he must afford "equal opportunities" to all other such candidates for that office in the use of such broadcasting station. If a legally qualified candidate appears on a bona fide newscast, bona fide news interview, bona fide documentary or on-the-spot coverage of a bona fide news event such an appearance will not be deemed a use of a broadcasting station for the purposes of Section 315. Thus, Section 315 does not apply to RNC's case since the Republican Party had not chosen its Presidential or Vice Presidential candidate at the time of Senator McGovern's appearance.

12. The Commission in *Zapple* held that when a licensee sells time to supporters or spokesmen of a candidate during an election campaign who urge the candidate's election, discuss the campaign issues, or criticize an opponent, then the licensee must afford comparable time to the spokesmen for an opponent. Further, *Zapple* held that the licensee is not obligated to provide free time to respond to supporters of a candidate if the supporters of the opposing candidate purchased time. The *Zapple* ruling dealt only with the appearance of supporters of candidates in situations where the candidate himself did not appear. The Commission has always held that Section 315 governs all situations in which a candidate appears, and in situations where neither *Zapple* nor Section 315 is applicable, the fairness doctrine must govern. Since the Commission's 1970 ruling, there have been a few times that *Zapple* has arisen on concrete cases.[7] See *In re Complaint of Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970), *Republican National Committee*, 25 F.C.C. 2d 739 (1970) and *Democratic National Committee*, 31 F.C.C. 2d 708 (1971).

13. The Commission recognized the possible misunderstanding surrounding this doctrine and attempted to clarify its meaning and direction in its fairness doctrine inquiry. See *Notice of Inquiry*, 30 F.C.C. 2d 26 (1971). The Commission in its *First Report*, *supra*, restated its intention that *Zapple* should apply only to appearances by supporters of candidates and not candidates themselves, when it stated:

> Our 1970 ruling, *Letter to Nicholas Zapple*, 23 FCC 2d 707 (1970), concerned campaign presentations that did not involve the appearance of the candidate. . . .
>
> What we were stating in *Zapple* was simply a common sense application of the statutory scheme. If the candidate himself appears to some significant extent (cf. *Gray Communications, Inc.*, 14 FCC 2d 766, 19 FCC 2d 532 (1968), then the Congressional policy is clear: equal opportunities, which means no applicability of *Cullman* but rather mathematical precision of opportunity. Suppose

[7] It should be noted that originally *Zapple* itself was a ruling based on hypothetical questions.

neither the picture or voice of the candidate is used—even briefly—but rather a political message devised by him and his supporters is broadcast. In those circumstances, a common sense view of the policy embodied in Section 315 would still call for the inapplicability of *Cullman* and for some measure of treatment that, while not mathematically rigid at least took on the appearance of rough comparability. If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half-hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity? Clearly, these examples deal with exaggerated, hypothetical situations that would never arise. No licensee would try to act in such an arbitrary fashion. Thus, the *Zapple* ruling simply reflects the common sense of what the public interest, taking into account underlying Congressional policies in the political broadcast area, requires in campaign situations such as the above (and in view of its nature, the application of *Zapple*, for all practical purposes, is confined to campaign periods). Significantly, because it does take into account the policies of Section 315, the public interest here requires both more (comparable time) and less (no applicability of *Cullman*) than traditional fairness.

14. RNC argues that *Zapple* should be applied in a common sense manner to prevent networks from giving unlimited free campaigning time to one candidate until a legally qualified opposing candidate is selected; that according to the *First Report* the present case is a situation meant to fall within *Zapple*; and that to allow Senator McGovern to make a political speech without providing the Republicans time to reply is patently contrary to the public interest and illogical. Neither in the *First Report* nor in any previous Commission rulings do we find any analogous situation or reasoning which supports RNC's contention that *Zapple* was meant to apply in this situation. RNC fails to cite any case which supports its contentions, and the *First Report*, which it initially cited in its original petition, is directly contrary to its arguments, i.e., *Zapple* is not applicable to appearances by candidates. Further, we do not agree with RNC that its interpretation is necessary to fill a vacuum in the legislative and regulatory scheme which would otherwise permit a candidate to receive "unlimited free campaign time." The Commission does not intend to adopt any policy which would allow discrimination between candidates. The Commission has at its hands Section 315, the *Zapple* doctrine and the general fairness doctrine to assure candidates are treated fairly.

15. RNC also argues that *Zapple* should apply to the McGovern speech because Senator McGovern was acting as a party spokesman and was in general advocating the election of members of the Democratic Party in the upcoming elections. To hold that every appearance by a major national candidate during an election period should be interpreted as primarily an appearance on behalf of all other similarly affiliated party candidates would frustrate the purposes and intent of both the *Zapple* doctrine and the equal opportunities requirement of Section 315. As we stated above, *Zapple* does not apply when candi-

dates themselves appear on the media. The Commission refuses to get into an analysis of whether a candidate's appearance on the air is primarily to advocate his own election or that of his party's candidates in general. Therefore the Commission rejects RNC's attempts to apply *Zapple* to the present case.[8]

16. The SLP and the Communist Party, U.S.A., request time to reply to Senator McGovern's August 5 speech and base their request on the equal opportunities requirement of Section 315. The SLP and the Communist Party, U.S.A., allege that their respective candidates for President were legally qualified candidates for President[9] at the time of the August 5th address. They argue that the broadcast should not be considered on-the-spot coverage of a news event so as to be exempt from the equal opportunities provision of Section 315 (see fn. 4 for pertinent excerpt of 315), since Senator McGovern used but one of the sixteen minutes of his address to announce his running mate; he later admitted to reporters that he had exploited the opportunity given to him by the national networks for his political purposes; the networks received excerpts of his speech before it was broadcast; Senator McGovern controlled the time and place of the announcement; and the speech should not be considered part of the continuing coverage of the Democratic convention.

17. Thus, with respect to the SLP and the Communist Party, U.S.A., complaints, the issue is whether the broadcast of Senator McGovern's August 5 address was exempt from the equal opportunities requirement of Section 315 as "on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)." We believe that Senator McGovern's appearance was exempt within the meaning of Section 315(a)(4) because it was incidental to a political convention—namely, the special meeting of the Democratic National Committee which had been called to select a new candidate for Vice President after unexpected events had resulted in the withdrawal of the candidate chosen at the Democratic National Convention in July. Senator McGovern's announcement of his choice was an activity incidental to the final voting of Democratic Party officials at their August 8 special meeting called specifically to select a new Vice Presidental nominee. The August 8 meeting had many elements similar to those of a national party convention, including disputes as to which members should be seated, nomination of a Vice Presidential candidate, voting for the Vice Presidential candidate and an acceptance speech. Although the meeting was extraordinary and not in the normal course of planning by the party, the Commission believes that, given the unique circumstances here present, it must be considered as having been the equivalent of a political convention within the meaning of Section 315(a)(4) and that broadcasts of it and events which were incidental to it, including Senator McGovern's address, were exempt from the equal opportunities requirement of Section 315.

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[8] Of course, the fairness doctrine is applicable to Senator McGovern's appearance, but as set forth in footnote 3, *supra*, RNC does not allege that any of the networks violated the fairness doctrine in the coverage of the issues.

[9] In view of our ruling here, we need not determine whether the SLP and the Communist Party, U.S.A., candidates for President are legally qualified candidates for President.

18. While the SLP and the Communist Party, U.S.A., argue that Senator McGovern only devoted one minute of his sixteen minute address to announcing his choice and that he admits using his address for political advantages, that does not change the exempt status of the program. Once the program is determined to be exempt from Section 315 obligations because it is on-the-spot coverage of a news event, the fact that a candidate uses the program for his political benefit does not make the program any less exempt. It is the nature of the news event which must be the controlling factor. It would be an unbearable burden for the networks during "live" on-the-spot coverage of an important news event to have to make constant journalistic judgments as to which parts of the event are "news" and which are purely "political." The ramifications of such a burden as it relates to the broadcasting of news are staggering. See *Democratic National Committee et al.*, v. *F.C.C.*, —— U.S. App. D.C. ——, —— F. 2d —— (decided February 2, 1972, case nos. 71-1637 and 71-1723). It should be noted that conventions which appear to hold great political advantages for a party and its candidate are specifically held to be exempt. The public should not be prevented from seeing important news events solely because the event features a candidate; that is the purpose of the Section 315 exemptions. Thus, the requests for "equal opportunities" by the SLP and the Communist Party, U.S.A., are rejected on the basis that the networks' coverage was exempt from the equal opportunities requirement of Section 315 in that it was on-the-spot coverage of a bona fide news event as an activity incidental to a political convention. We emphasize that our ruling is limited to the unique facts of this case.

19. The Communist Party, U.S.A., also alleges that CBS violated the fairness doctrine. However, in its complaint it failed to state (1) the specific issue or issues of a controversial nature of public importance presented by the network; (2) the basis for the claim that the network broadcast only one side of the issue or issues in its overall programming, and (3) whether the network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue or issues. See *Allen C. Phelps*, 21 FCC 2d 12, 13 (1969). Until additional information is received, no further action can be taken regarding the fairness complaint.

20. Accordingly, and for the reasons set forth above, the complaints of the Republican National Committee, the Socialist Workers Party and the Communist Party, U.S.A., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-935

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Cease and Desist Order To Be Directed Against SEDONA-OAK CREEK TV & CABLE CO. OWNER AND OPERATOR OF CABLE TELEVISION SYSTEMS AT SEDONA AND AT OAK CREEK CANYON, ARIZ.	Docket No. 19553 SR-17111

MEMORANDUM OPINION AND ORDER

(Adopted October 18, 1972; Released October 26, 1972)

BY THE COMMISSION:

1. This proceeding was initiated by an Order to Show Cause, FCC 72-649, 36 FCC 2d 125, released July 26, 1972, which directed that Sedona-Oak Creek TV & Cable Co., show cause why it should not be ordered to cease and desist from violating Section 76.91 of the Commission's Rules on its cable systems at Sedona and at Oak Creek Canyon, Arizona. Grand Canyon Television Co. is the licensee of Station KOAI-TV Flagstaff, Arizona, which places a predicted Grade A contour over Sedona and Oak Creek Canyon, Arizona. Grand Canyon requests program exclusivity pursuant to Section 76.91 of the Rules, which Sedona-Oak Creek TV & Cable Co. has not provided even though the Commission directed it to do so. *Sedona-Oak Creek TV & Cable Co.*, FCC 72-254, 34 FCC 2d 288.

2. At the request of Sedona-Oak Creek, the prehearing conference originally scheduled for September 5, 1972, was postponed to September 25, 1972. On September 22, 1972, Sedona-Oak Creek filed a "Waiver of Hearing and Statement of Respondent" in which it waived its right to a hearing; indicated its intention to operate in compliance with Section 76.91 of the Rules upon receipt of a non-duplication switcher it has ordered; and requested that the proceeding be terminated. On September 25, 1972, Administrative Law Judge Ehrig issued an Order, FCC 72M-1026, terminating the proceeding and certifying the case to the Commission.

3. In view of Sedona-Oak Creek's failure to provide any affirmative defense to Grand Canyon's uncontroverted allegations, and in view of the prolonged nature of this controversy, we will issue the cease and desist order.

Accordingly, IT IS ORDERED, that within two (2) days after release of this Memorandum Opinion and Order, Sedona-Oak Creek TV & Cable Co., CEASE AND DESIST from the operation of its cable television systems at Sedona and at Oak Creek Canyon, Arizona in violation of Section 76.91 of the Commission's Rules and Regulations; provided however, that if Sedona-Oak Creek TV & Cable Co.,

notifies the Commission within two (2) days of the release of this Memorandum Opinion and Order (exclusive of Saturdays, Sundays, and holidays, if any) that it intends to seek judicial review and a judicial stay within fourteen (14) days of the release date of this Order, this Order shall be stayed for thirty-five (35) days from its release date or until judicial determination of a stay motion, whichever occurs first.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-919

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TEX-ARK TV COMPANY, INC. (KTXK-TV), TEXARKANA, TEX. For Extension of Construction Permit	Docket No. 19612 File No. BMPCT-7416

ORDER

(Adopted October 12, 1972; Released October 18, 1972)

BY THE COMMISSION:

1. The Commission has before it for consideration the request of Tex-Ark TV Company, Inc., for reinstatement of the construction permit, call sign and application (BMPCT-7416) for an extension of time within which to complete construction of television broadcast station KTXK, channel 17, Texarkana, Texas.

2. Tex-Ark TV Company, Inc., was granted a construction permit for channel 17, Texarkana, Texas, on February 10, 1971, with completion of construction required as of August 10, 1972. Subsequently, on July 19, 1972, the permittee filed the above-captioned application (BMPCT-7416) for an extension of time within which to complete construction of station KTXK. The permittee stated that it had been unable to secure suitable programming for the station and that it was continuing its efforts to obtain programming. In addition, the permittee indicated that it was reconsidering the feasibility of constructing the station in view of the recent establishment of a CATV system in the Texarkana area. The permittee requested a one year extension of time in order to assess the possible impact of the CATV system on construction of station KTXK. Since grant of Tex-Ark TV Company, Inc.'s construction permit in February 1971, construction of the station has not commenced and equipment has not been ordered.

3. After the lapse of approximately eighteen months from the date the Commission issued a construction permit for channel 17, the permittee had failed to demonstrate that it had exercised due diligence in the prosecution of construction or that construction had been prevented by causes not under its control within the meaning of section 319(b) of the Communications Act of 1934, as amended. Accordingly, the Chief, Broadcast Bureau acting pursuant to delegated authority [1] dismissed the above-captioned extension application, cancelled the construction permit and deleted the call sign. However, in accordance with the provisions of the delegation, the permittee was advised that it could request reinstatement of its authorization within thirty days and thereby obtain a hearing on the question of its dismissal. Subse-

[1] Section 0.281(z) of the Commission's rules.

quently, on August 21, 1972, the permittee requested reinstatement of its authorization and a grant of its extension application. Since we are unable to find that grant of the extension application, without a hearing, would be in the public interest, we are designating the application for oral argument before the Review Board.

4. IT IS ORDERED, That the construction permit, call sign and extension application of television broadcast station KTXK, channel 17, Texarkana, Texas, ARE REINSTATED.

5. IT IS FURTHER ORDERED, That the above-captioned application for an extension of time within which to complete construction of station KTXK, channel 17, Texarkana, Texas, IS DESIGNATED FOR ORAL ARGUMENT before the Review Board in Washington, D.C., at a time and place to be specified in a subsequent order, upon the following issue:

> To determine whether the reasons advanced by the permittee in support of its request for an extension of its completion date, constitute a showing that failure to complete construction was due to causes not under the control of the permittee, or constitute a showing of other matters sufficient to warrant a further extension of time within the meaning of section 319(b) of the Communications Act of 1934 and section 1.534(a) of the Commission's rules.

6. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the applicant, in person, or by attorney, shall, within ten (10) days of the mailing of this Order, file with the Commission an original and twelve copies of a written appearance stating an intention to appear on the date fixed for the oral argument and present arguments on the issue specified, and shall have until October 25, 1972, to file a brief or memorandum of law.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-790

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
THE VALUE LINE SPECIAL SITUATIONS FUND, INC.
For Ruling Re Voting Stock

SEPTEMBER 7, 1972.

Mr. JOSEPH M. BERL,
c/o Fortas and Koven,
1054 Thirty-first Street, NW.,
Washington, D.C. 20007

DEAR MR. BERL: This is in reply to your letter of August 4, 1972 in which you present to the Commission the relevant facts concerning the ownership of stock by The Value Line Special Situations Fund, Inc. (the Fund), a mutual fund, in Commission licensees and a proposal for the elimination of any problems this ownership may present with regard to the Commission's multiple ownership rules.

Your letter states, and Commission records indicate, that the Fund owns 3% or more of the voting stock of Downe Communications Systems, Inc. (Downe) and Pacific and Southern Broadcasting Co., Inc., both of which are multiple owners of broadcast stations. As explained in the Commission's letter to the Fund on July 19, 1972, this ownership results in a violation in the Commission's multiple ownership rules. Your letter presents the following proposal:

> The Fund now proposes to enter into a contract with Downe pursuant to which the Fund would agree that in all situations in which the Fund is entitled to vote its shares it will vote less than 3% of the outstanding voting shares. Downe would agree that in all situations in which the Fund votes its shares, it will count only votes representing a number of shares less than 3% of the outstanding voting stock of Downe.

Commission rules prohibit the *ownership* of 3% or more of the voting stock of broadcast licensees by mutual funds if such ownership results in a violation of the Commission's multiple ownership rules. In view of the fact that the above-quoted proposal in no way reduces the ownership of voting stock to permissible levels, you are hereby advised that the Commission finds the proposal unacceptable.

Accordingly, you are requested to furnish the Commission within 10 days of the date of this letter, a statement of the Fund's action with regard to the necessary divestiture of its broadcast stock.

Commissioners Johnson and H. Rex Lee were absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-865

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE WESTERN UNION TELEGRAPH CO., NEW YORK, N.Y. Consolidation of 22 Public Telegraph Offices into Single Public Message Center	Docket No. 19267 File No. TD 17972

DECISION

(Adopted September 27, 1972; Released October 4, 1972)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; AND WILEY CONCURRING IN THE RESULT; COMMISSIONERS JOHNSON AND HOOKS DISSENTING.

APPEARANCES

R. C. Hostetler, Jack Werner, David A. Irwin, David H. Lubetzky, on behalf of The Western Union Telegraph Co.; *Robert E. Conn, Thomas J. McCabe, Ernest Brod, Roger P. Newell* on behalf of Western Union International, Inc.; *H. Howard Ostrin, Charles J. McDonald, John Morgan* on behalf of the Communications Workers of America, Local 1177, CWA: *Howard A. White, Thomas R. Mathias* on behalf of ITT World Communications, Inc.; *Robert A. Jablon, Edward S. O'Neill, Stuart Richel* on behalf of the Public Service Commission of the State of New York; *Charles H. Miller, John J. Ryon, Jr., E. Edward Bruce* on behalf of Tropical Radio Telegraph Company; *Carolyn Collins, William Fishman* on behalf of the Common Carrier Bureau, Federal Communications Commission.

1. On June 5, 1972, the Chief of the Common Carrier Bureau issued his Recommended Decision and Order in this proceeding. In it he concluded that the public interest would be served by a partial grant of The Western Union Telegraph Company's (Western Union) application to consolidate 22 public branch offices in lower Manhattan into a single Public Message Center (PMC). He recommended denial of the application with respect to over-the-counter facilities at "UJ" office, and a grant in all other respects. The Recommended Decision expresses general approval of the concept of modern, well-equipped and sufficiently staffed public message centers to serve other areas of New York City in lieu of numerous branch offices, while cautioning that the discontinuance of any additional branch offices must be preceded by an appropriate application from Western Union for Commission authorization. Such authorization would be granted only upon a finding by the Commission that the telegraph needs of the public can be reasonably satisfied by the proposed consolidation of branch office functions.

2. The Recommended Decision and Order imposes certain condi-

tions on the authorization, including the establishment of three supplemental acceptance agencies, and a requirement that Western Union submit in writing for Commission approval its staffing plan for the proposed PMC setting forth the formula by which it will determine and maintain the number of messenger and nonmessenger forces that will be utilized at the PMC to provide an adequate speed and quality of service. An additional condition prescribes that once an approved plan is placed in effect, there shall be no change in, or deviation from, the plan without prior written approval of the Commission upon submission of a written showing as to the justification for such proposed change or deviation.

3. Exceptions to the Recommended Decision have been filed by Western Union and Western Union International, Inc. (WUI). Western Union has filed a Motion to Strike the Exceptions of WUI on the grounds that they do not conform to Section 1.277 of the Commission's Rules requiring exceptions to be concise and free of argument. An Opposition to Motion to Strike has been received from WUI. While some of WUI's exceptions may be considered unduly argumentative in nature, we find them substantially in accord with Section 1.277, and hereby deny Western Union's Motion to Strike.

4. Finally, WUI has filed a Request for Oral Argument, asserting that in light of the importance of the matter and the dispute among parties to this case, oral argument would be useful to the Commission for its ultimate determination of this proceeding. An Opposition to Request for Oral Argument has been filed by Western Union. We believe that the issues have been adequately explored in the hearings and on the pleadings and that no useful purpose would be served by oral argument.

5. After careful consideration of the findings of fact and conclusion in the Recommended Decision and Order, the Commission is of the opinion that those findings and conclusions, together with the reasons and bases therefor, are correct and substantiated by the evidence of record. However, in light of certain of the exceptions filed by Western Union and WUI to the Recommended Decision, we believe that the following additional comments on our action herein are in order. Our rulings on the exceptions of WUI are contained in the Appendix hereto and paragraph 7 below.

6. First, we have taken special note of Western Union's sole exception to the Recommended Decision which is directed against the conditions set forth therein with respect to the staffing plan for the PMC. Western Union asserts that the requirements are impractical and are an unwarranted infringement on management prerogatives. Western Union suggests in lieu thereof its commitment to speed of service objectives to be established jointly by the Commission's staff and company. We agree that the conditions relating to the staffing plan for the PMC involve extraordinary regulatory measures. However, we cannot agree that they are impractical or, under the circumstances, an unwarranted infringement on the prerogatives of management. The success or failure of the proposed PMC will depend principally upon adequate staffing, and the risk of failure is a risk we cannot afford to take. It has been our long-term past experience that, notwithstanding the existence of well-defined speed of service objectives, Western

Union's marginal staffing of its operations have had adverse effects upon the quality, reliability and speed of message telegraph service. This experience, in our judgment, dictates the need and desirability, at least during the initial stages of the PMC program, of closer than customary regulatory control of Western Union's staffing plan for the PMC, and its implementation of such plans. We believe that with Western Union's cooperation the need for such regulatory surveillance can be satisfied in a manner which will accomplish our objective with a minimum of practical difficulties and at the same time allow Western Union a reasonable degree of flexibility for the exercise of responsible managerial action consistent with those objectives.

7. Second, we wish to stress that our approval of the specific PMC plan involved in these hearings, as well as our endorsement of the concept of office consolidations of this type, does not imply an automatic approval of additional consolidations in the New York City area. We are convinced that office consolidations, under appropriate circumstances, can be compatible with the interest of the public in efficient and adequate telegraph service and a properly equipped and financially viable telegraph company. Whether the appropriate circumstances exist in the case of a particular PMC proposed by Western Union will, of course, be thoroughly examined on the basis of the facts presented in properly documented applications, public and employee responses, and our staff investigation and evaluation.

8. The findings and conclusions, together with the reasons and bases therefor, are adopted and issued as the final Decision of the Commission in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

RULINGS ON EXCEPTIONS OF WESTERN UNION INTERNATIONAL INC. TO RECOMMENDED DECISION.

Exception No.	*Ruling*
1	*Denied.* See paragraph 6 of the Recommended Decision and paragraph 7 of our Decision herein.
2	*Denied.* Apart from its limited decisional significance, there is ample evidence to support the finding that, since 1940, there has been a substantial decline in public message telegraph traffic in New York City and elsewhere. In any event, and even assuming the validity of WUI's critique of the specific historic traffic data, the evidence of record with respect to *current* traffic loads and patterns amply support the conclusion that consolidation of the offices involved herein, subject to the conditions being prescribed, will not adversely affect the public convenience and necessity.
3	*Denied,* for reasons stated in paragraphs 57 and 58 of the Recommended Decision.
4	*Denied.* Conclusions in paragraph 31 clearly supported by evidentiary record. See also ruling on Exception No. 1.
5	*Denied.* Allegations that problems of staffing multiple branch offices in New York City could be cured by better management are speculative and unsupported.

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Exception No.	*Ruling*
6	*Denied.* While major aspects of the company's overall modernization plans for its public message services can undoubtedly be accomplished absent the proposed consolidation of branch offices in lower Manhattan, the record is clear that the PMC concept is essential to full development of Western Union's computer switching program, and particularly critical to application of this program to New York City.
7	*Denied.* The financial condition of an office, although relevant in the context of Section 214, is not determinative of the effect of closure upon the convenience and needs of telegraph patrons. See footnote 9 of Recommended Decision.
8	*Denied.* Conclusions as stated appear to be reasonable supported by the evidence of record.
9	*Denied.* The Recommended Decision considered the public need for the 22 offices on an individual and collective basis. Paragraphs 35 through 45 of the Recommended Decision.
10	*Denied.* As stated in Paragraph 47, record contains persuasive support that consolidation of messenger forces at the PMC coupled with other indicated operational and supervisory improvements should make messenger pickup and delivery service equal to or better than under present office configuration.
11	*Denied,* for reasons stated in paragraph 43 and paragraphs 45 through 50.
12	*Denied.* Findings in paragraph 44 with respect to CS office adequately supported.
13	*Denied.* Identical to Exceptions Nos. 10 and 11.
14	*Denied.* Repetition of argument already considered.
15	*Denied.* Repetition of argument considered in paragraph 53.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE WESTERN UNION TELEGRAPH CO., NEW YORK, N.Y. Consolidation of 22 Public Telegraph Offices into Single Public Message Center	Docket No. 19267 File No. TD 17972

RECOMMENDED DECISION AND ORDER

(Adopted June 5, 1972; Released June 7, 1972)

BY: CHIEF, COMMON CARRIER BUREAU.

APPEARANCES

R. C. Hostetler, Jack Werner, David A. Irwin, David H. Lubetzky, on behalf of The Western Union Telegraph Co.; *Robert E. Conn, Thomas J. McCabe, Ernest Brod, Roger P. Newell* on behalf of Western Union International, Inc.; *H. Howard Ostrin, Charles J. McDonald, John Morgan* on behalf of the Communications Workers of America, Local 1177, CWA; *Howard A. White, Thomas R. Matias* on behalf of ITT World Communications, Inc.; *Robert A. Jablon, Edward S. O'Neill, Stuart Richel* on behalf of the Public Service Commission of the State of New York; *Charles H. Miller, John J. Ryon, Jr., E. Edward Bruce* on behalf of Tropical Radio Telegraph Company; *Carolyn Collins, William Fishman* on behalf of the Common Carrier Bureau, Federal Communications Commission.

1. In a Memorandum Opinion and Order, FCC 71–651, released June 23, 1971, the Commission set for hearing, pursuant to the provisions of Section 214 of the Communications Act of 1934, as amended, an application (TD–17972) filed on March 22, 1971, by the Western Union Telegraph Company (hereafter "Western Union" or "WU") for authority to discontinue its Class 1 (Main Office) and associated 21 branch offices in New York City and to establish substitute facilities therefor. The offices in question, serving the area of Manhattan south of 24th Street, and their addresses, are listed below:

Class 1 (NNA)	166 West Broadway.
AX	2 Broadway.
BM	428 Broadway.
BW	11 Broadway.
BY	17 Barclay Street.
CH	85 John Street.
CS	70 Pine Street.
DN	5 Debrosses Street.
EQ	80 Cedar Street.
FW	90 West Street.
FX	44 Beaver Street.

GT	89A Worth Street.
JB	1 West Third Street.
JT	200 Varick Street.
MP	71 Broadway.
NF	25 West 14th Street.
NH	371 Grand Street.
NJ	34 Eighth Street.
NW	40 Wall Street.
SQ	36A Third Avenue.
UJ	75A New Street.
VU	130 Nassau Street.

2. In lieu of these offices, Western Union proposes the establishment of a single public message center (hereafter "PMC") to be located near the load center of the affected area, at 15 Maiden Lane. Briefly, the company contends that the establishment of a single office and the centralization of operating forces will overcome many of the service, staffing and facility problems now existing at the smaller and diverse offices, and would result in greatly improved service to the public. It represents that the PMC would be equipped to provide all presently available public office services, as well as any future offerings which may be initiated. The proposal envisions use of computer-switching for traffic destined to lower Manhattan, which would ultimately enable all major cities to switch traffic directly to the consolidated office, bypassing the reperforator system and present manual terminal switching operation at the New York relay center.[1]

3. Western Union claims that with the decline over the years in public counter use of the 22 offices proposed for discontinuance, there no longer exists a need for the multiple office locations in the area covered by the application. The company also plans further similar modifications in the remainder of the New York City area.

4. In setting the application for hearing, the Commission stated that it was unable to determine from the facts contained in the application and related pleadings whether Western Union's overall proposal would serve the public convenience and necessity, and specified that hearings be held in both Washington, D.C. and New York City, the latter location specifically to permit the participation of local users or user groups. In addition, the Commission noted that inasmuch as the company had indicated that it contemplated seeking authority to establish 5 or 6 additional PMC's in the New York metropolitan area, with the concomitant discontinuance of existing public branch offices, consideration should be given to these plans as well as to the instant application. The following issues were designated by the Commission for hearing:

> 1. To determine the character, quality, scope and adequacy of telegraph service, facilities, and personnel now provided through applicant's facilities sought to be discontinued in the above described application;

[1] During the course of the hearings, and at the suggestion of counsel for the Common Carrier Bureau, Western Union modified slightly its original proposal. In addition to opening the PMC, the company proposed the establishment of three "satellite" agency offices in the northern part of lower Manhattan to serve patrons farthest away from the proposed PMC.

2. To determine the character, quality, scope and adequacy of telegraph service, facilities, and personnel which would be provided if the application was granted;

3. To determine, through a comparison of the character, quality, scope, and adequacy of the proposed service, facilities and personnel with those now being provided, the extent to which and respects in which the proposed change will result in reduction, impairment, extension or improvement in service;

4. To determine the nature and extent of the requirements of local telegraph users for telegraph service, and the ability of the proposed public message center to meet such requirements;

5. To determine the extent of any savings and reduction in revenue requirements which will accrue to the applicant from the consolidation of its facilities as proposed in the application, and the weight to be given this factor;

6. To determine the extent to which the proposed consolidation may result in either a diminution or increase in the use of telegraph service;

7. To determine how a grant of the application would affect the availability of money order service;

8. To determine Western Union's plans and expectations with respect to future applications similar to the above-captioned one, and whether, in principle, such plans would, if implemented, serve the public convenience and necessity;

9. To determine the effect (a) of Western Union's overall plans with respect for PMC services in New York City, and (b) in particular the effect of a grant of the foregoing application on the provision of international telegraph service;

10. To determine whether grant of the foregoing application, in light of the evidence adduced pursuant to the foregoing issues will adversely affect the present or future public convenience and necessity.

5. Hearings in this proceeding were held on 13 days in Washington, D.C. and on one day in New York City. In addition to the Common Carrier Bureau and Western Union (WU), several other parties participated. Western Union International, Inc. (WUI), the Communications Workers of America, AFL–CIO (CWA), the New York State Public Service Commission (NYPSC), ITT World Communications, Inc. (ITT), and Tropical Radio Telegraph Company (Tropical) all participated in the hearings in various degrees. Direct testimony or evidence was submitted by WU, WUI, CWA, NYPSC and Tropical. The record was closed and certified to the Commission on November 29, 1971. Proposed Findings and Conclusions were submitted by WU, WUI, CWA and Tropical by February 8, 1972. Reply Briefs were filed by WU, WUI and ITT by March 1, 1972.

6. On the basis of all evidence of record, we have concluded that the public interest would be served by a partial grant of Western Union's application to discontinue its Class 1 office and 21 branch offices, as named, with alternate service to be provided essentially through the proposed Public Message Center at 15 Maiden Lane, and contingent upon the establishment of a minimum of three public acceptance agencies in the northern part of the affected area, and further upon the estab-

lishment of minimum messenger staffing standards. For reasons hereafter discussed we believe the application should be denied insofar as "UJ" branch office is concerned and granted in all other respects. Additionally, we express general approval of the concept of modern, well equipped and sufficiently staffed public message centers to serve other areas of New York City in lieu of numerous branch offices. Of course, the discontinuance of any additional branch offices must be preceded by an appropriate application from Western Union for Commission authorization which will be granted only upon a finding by the Commission that the telegraph needs of the public can be reasonably satisfied by a consolidation of branch office functions.

7. In Section II, the relevant facts contained in the application and evidence adduced at the hearings will be discussed. Section III discusses and analyzes these considerations and sets down in detail the conclusions reached.

Section II

8. Essentially, the company bases its case on the drastic decline which has occurred over the past 30 years in the volume of counter acceptance traffic in New York City. Supporting data entered in the record show that from 1940 to 1971, monthly originating volume for all New York City branch offices declined from about 2,000,000 telegrams to 400,000, or by 80%. Likewise, the number of messages delivered by messenger has declined at a comparable rate. The present configuration of branch offices has remained virtually unchanged during that period, and the company contends that in light of present traffic loads the public can be better served through a few public message centers placed at strategic locations throughout the city. Western Union attributes the decline in counter acceptance and messenger delivery volumes to growth in customer-to-customer exchange service (Telex and TWX), private wire systems and greater use of the telephone for filing and delivering messages. The company believes that under the existing circumstances the establishment of modern, up-to-date PMC's capable of providing all available services with state-of-the-art capabilities, equipment and facilities in lieu of multiple offices would best serve the public interest.

9. In the specific application at issue here, the company proposes to establish a new public message center at 15 Maiden Lane as the sole substitute facility for the 22 present branch offices located in lower Manhattan, south of 24th Street.[3] All of the branch offices offer public counter service, but only 6 of them presently provide messenger pickup and delivery service. Two of the offices (NNA and UJ) are open 24 hours per day, 7 days a week. The others observe normal business hours, Monday through Friday, except SQ which is open until midnight on those days.

10. Specifications for the PMC call for a public office on the first floor and an operating room on the second. Entrance to the public office

[3] Temporary emergency authority to close BM office was granted on January 27, 1971 and the office has not been reopened. For the six months period prior to the emergency closing, this office handled an average of 18 revenue messages per day. As noted heretofore, during the course of the hearing, the company offered to establish three agency offices in the northern part of the area involved to serve patrons farthest from the proposed PMC.

will be from both Maiden Lane and John Street.[4] The quarters will be of modern design and will be laid out for efficient operation and employee comfort. The counter section will be bandit proofed with bullet proof glass for employee protection. Security guards will be assigned. The layout of the operating room will be such as to facilitate maintenance without interference with on-going operations. Both the public office and operating room will be open 24 hours per day, 7 days a week. While the record does not show the exact number of employees to be assigned to the PMC, the company states that all existing branch office personnel assigned to the 22 offices, including messenger, who desire will be reassigned to the consolidated office, plus any additional force that may be required to provide adequate service and around-the-clock operation. The company plans to employ a radio-paging service as an aid in dispatching and controlling messengers.

11. The company contends that 15 Maiden Lane is at the approximate telegraph traffic load center for lower Manhattan, below 24th Street: geographically the proposed PMC location is in the lower third of the area affected by the application. Studies submitted in evidence show that about 75% of the combined counter acceptance and messenger pickup and delivery load occurs at branch offices within a radius of .4 of one mile of 15 Maiden Lane. Fifty percent of the money order handlings were filed at offices within that radius.

12. In its testimony, Western Union describes the difficulties inherent in supervising multiple offices, the problems of staffing for unexpected absenteeism and for prompt equipment repair, the greater likelihood of crime at isolated locations, and the delays to message traffic occasioned by need of switching clerks at the central office to consult lengthy route charts before switching messages to terminating branches. Most of these problems, in the company's view, would be eliminated or greatly simplified by the consolidation of the branch operations into the PMC. The larger, flexible work force would minimize the effects of unpredicted absenteeism and have the ability to absorb unexpected increases in workload, a technical service maintenance center will be located in the same building, and the consolidated messenger force will permit messages to be sent out more promptly.

13. Moreover, the carrier contends that the PMC concept is essential to full development of its computer switching modernization program. This program calls for eventual phase-out of all of the electro-mechanical reperforator tape switching systems with replacement by computer switching. Currently, traffic terminating in New York City is switched to destination through a terminal reperforator system designated as Plan 38. For each incoming message, the switching clerk must determine from a 40 page routing chart whether the addressee is served by tieline, Telex or TWX, or whether the message is to be delivered by telephone or by messenger, and if by messenger which of the 102 branch offices serves the patron's location. This is a time consum-

[4] Western Union's Exhibit 2, Attachment No. 7, entered in the record, shows the space to be used for public office operations to be situated along the arcade between the Maiden Lane and John Street entrances of the building, with the display window fronting on John Street and the customer entrance to be from the arcade near that point. The address of this entrance, 18 John Street, would appear to be a more appropriate designation for the PMC than 15 Maiden Lane. The section of the office to be used for messenger dispatching will be located near the midpoint of the arcade with separate entrance from the arcade.

ing operation and frequently results in serious delays to message traffic. The Plan 38 equipment is old and subject to malfunctions; and is not designed for optimum operational efficiency. The modernization plans call for replacement of the Plan 38 with a computer, through which messages can automatically be switched on the basis of postal zip code routings, thus substantially improving terminating speed of service. The company contends that it would not be practical, because of the large memory storage unit required, to program a computer to make the numerous look-ups and decisions now made by switching clerks, and that the service improvement program is thus dependent upon consolidation of delivery traffic into a few offices. The instant PMC and others contemplated would handle all traffic destined to specific geographic areas regardless of whether ultimate delivery is to be by tieline, telephone or messenger. (Extensive manual handling of messages will still be needed at the PMC.)

14. Western Union, in its direct testimony, views the economic aspects and cost savings pertinent to the consolidation of branch office operations as incidental and secondary to the claimed service improvement aspects of the program. For the proposed 15 Maiden Lane PMC, the company estimates the capital outlay to be $426,000. The net annual saving is estimated to be about $212,000, resulting from reduction of operator premium time, message switching costs, multiple real estate leases and office maintenance costs.

15. Subsequent to filing of the application by Western Union and up to the time the proposal was set for hearing, some 16 letters of protest had been received from members of the public. Half of these protests are directed against the office at 89A Worth Street (GT) and are confined to general statements of opposition to any change. The application shows this office to accept an average of 10 messages daily over the counter. The remaining 8 protests, which were also general in nature, were directed against 8 separate offices.

16. All of the other carriers or organizations named by the Commission as parties to the proceeding raised questions regarding various aspects of Western Union's proposal with strong opposition coming from Western Union International, Inc. and the CWA. WUI is an international carrier, which relies in part on facilities and services of Western Union for their pickup and delivery of international traffic. WUI believes that discontinuance of the existing branch offices will create severe hardship for people in need of over-the-counter service because of the greater distance from their homes or places of business to the PMC location and the expense in some instances of public transportation to reach that facility. WUI also claims that because of the distance involved between the PMC and some points in the affected area, messenger deliveries will take substantially longer than they do at present. This international carrier also contends that the public is opposed to Western Union's proposal, and that WU made no serious effort to determine public reaction to the consolidation of facilities.

17. WUI in the hearing and in its pleadings challenges the reliability of certain statistical information in WU's application; the wisdom, from the standpoint of effects on service of the selection of 15 Maiden Lane as the optimum location for a consolidated office, asserting that a scientific load study would show a load center well to the

south of Maiden Lane; Western Union's need to discontinue multiple branch offices in order to achieve its overall modernization objectives; and the effect of the proposal on the filers of international messages and WUI itself. In this latter respect, WUI points out that under the international distribution formula it is entitled to all unrouted international traffic filed at Western Union offices south of 60th Street, and expresses concern that closing of branch offices in that area will cause traffic to be diverted to its competitors.

18. WUI is critical of Western Union's management practices, and advances the opinion that the problems that are being experienced at the 22 offices in issue stem mainly from poor management. It cites the unattractive appearance of some of the offices, a lack of advertising of telegraph services and inadequate identification of offices, as factors contributing to growing disuse of the offices by the public.

19. WUI further claims that the PMC can co-exist with all or many of the present branch offices, and that the agreement to establish three agency offices in the northern part of the territory will be wholly inadequate. It strongly urges the permanent retention of at least two of the existing branches, specifically UJ and CS offices. WUI also urges that WU be required to open a new office in the World Trade Center, now under construction, and to retain the present branch office configuration for at least a year after any PMC is established.

20. WUI's final point in its pleadings is that WU, in determining the location of the proposed PMC, did not take into consideration the effect upon competition between international carriers. Since two other international carriers have offices in the area which are closer to the location of the UJ office (the WU office that accounts for the largest number of international filings in lower Manhattan) WUI contends that there will be a diversion of traffic to these two carriers. WUI believes, therefore, that the office closure/PMC concept will cause it to lose traffic and will adversely affect the present competitive balance among international carriers.

21. The Communications Workers of America, AFL–CIO (CWA) appeared at the hearings, participated in cross examination of witnesses and filed Proposed Findings of Fact and Conclusions. This organization, while having certain reservations about the PMC concept, appears to see merit in the establishment of a PMC at the proposed location to serve the southernmost portions of Manhattan. It urges, however, that four existing branch offices (NNA, NH, NJ and SQ) be retained to serve the area north of Maiden Lane. The CWA document states that the labor organization "does not *per se* oppose the establishment of the PMC, provided the public will not be inconvenienced thereby." [5] The union submits, however, that those telegraph patrons now served by the four branch offices specified above will be inconvenienced if these offices are discontinued.

22. The CWA expresses certain doubts about the efficacy of Western Union's proposal and plans. It does not believe that the PMC will solve the problem of delayed messenger pickups and deliveries. It also has serious doubts as to the ability of the three proposed agencies to handle the volume of traffic in the northern part of the affected area,

[5] Brief and Recommendations submitted by CWA, page 11.

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pointing out that this section is now served by 10 offices with total traffic load filed over the counter in excess of 100 messages daily.

23. With respect to the PMC itself, CWA contends that the security measures proposed by WU are inadequate because the company allegedly does not intend to provide around-the-clock security guards, but to have guards on duty only from late afternoon until 8:00 the following day. CWA also claims the space and site selected for the PMC are inadequate and poorly located. The space is alleged to be too small to accommodate either customers or employees without considerable congestion. Additionally, CWA believes that the PMC should be located closer to Wall Street so that telegraph facilities will be more convenient to the financial community.

24. The CWA pleading also is critical of Western Union's management of its branch offices, citing as examples of poor management, or disregard of the public interest, temporary emergency closing of offices and lack of reasonable effort to find alternate quarters for an office prior to expiration of a lease. The company's direct testimony was also criticized as reflecting a lack of detailed knowledge of the New York transportation system and therefore, containing questionable predictions by WU as to the travel times between the PMC and various locations in lower Manhattan. CWA cites the letter from a New York State Assemblyman as evidence of public opposition to closure of the 22 offices. Finally, they point out, as did other parties, that, according to the record, the current operation of the 22 offices as a group is profitable.

25. Tropical Radio and Telegraph Company's (Tropical) opposition to the PMC is directed solely to issue No. 9 in the Commission's hearing order. As does WUI, Tropical contends that the proposed consolidation of branch offices into a single PMC on Maiden Lane will have a deleterious affect on international carriers such as itself who do not maintain their own public offices in New York City. This carrier fears a possible diversion of traffic, which is now filed with Western Union and routed via Tropical, to RCA and ITT because the latter public offices will be more convenient than WU's PMC. This proposal would thus, in Tropical's view, result in unnecessary and unwarranted diversion of traffic to RCA and ITT, to the enhancement of these carriers' position and reduction of competition within the international record industry.

26. ITT World Communications, Inc. (ITT) also bases its interest in this proceeding primarily on the issue of international communications. ITT takes a position contrary to that of WUI and Tropical and believes that grant of the application will result in improved international telegraph service. This carrier does not foresee any adverse impact on international telegraph traffic resulting from the consolidation of the 22 branch offices into a single center. Multi-office configuration in rendering public message service, ITT contends, is important only when a substantial portion of the traffic handled is over the counter. ITT points out that WU noted that on a system-wide basis, counter acceptance accounts for only 13% of the originating load, and that increasingly customers have turned to telephone, Telex and tielines. By and large, according to ITT, international communications customers located in lower Manhattan will have ready access to the PMC by tie-

line, Telex or TWX. For those international users who will not have access to the PMC by any of the foregoing means, ITT notes that both RCA Global Communications and ITT have public offices in the financial district within a few minutes walk of existing WU branch offices. In the event that these WU offices are closed, users who had normally filed international messages over the counter at those offices, according to ITT, will still have public offices maintained by RCA and ITT readily available.

27. ITT concludes that if WU's application is granted, there will be no adverse impact on international service but, on the contrary, the result should be improved service because the PMC will replace several obsolete facilities with a modern one designed to offer the public a full range of communications services more efficiently than the present operation in the affected area. Finally, ITT points out, the PMC will be reasonably accessible to users in the lower New York City area who have the highest international requirements and its location will conveniently complement international record carrier offices already in this general area.

28. The New York State Public Service Commission (NYPSC) participated in the proceeding and concluded that the proposed PMC at 15 Maiden Lane could adequately serve commercial customers within a 2,000 ft. radius, but would not suit the needs and convenience of residential and commercial customers in the northern part of the affected area. It believes, however, that the establishment of three Class 9–B agencies (acceptance only) in the northern part of the area, as WU has proposed, will provide adequate service for that area. It recommends that prior to the implementation of the proposed closing, however, WU demonstrates to the satisfaction of both the FCC and the NYPSC that the PMC and Class 9–B agencies are in service and functioning adequately. It recommends that the proposed 9–B agency serving the area presently served by the SQ office maintain the same hours that the SQ office currently maintains, that is, 8 AM to midnight, Monday through Friday, and 8 AM to 4 PM on Saturday.[6]

29. The New York City phase of the hearings, designed to permit the participation of local users, was held on October 19, 1971. Prior to this date, at the Examiner's direction, the company placed notices in several New York City newspapers [7] and at each of the affected WU branch offices, giving the date, time, and nature of the hearings. In spite of this, only two public witnesses appeared to testify. The first, a businessman who subscribed to WU Telex service, testified that he used the public message service only when his Telex equipment was inoperable, which had been six times in the past two years, normally for two or three days at a time, although on one occasion his Telex equipment was out for a period of two weeks. On these occasions, he would file messages at the UJ office at 75A New Street, which is closer

[6] New York Public Service Commission Exhibit No. 1.

[7] Western Union placed notices of the hearing in the *New York Times, New York Post, New York Daily News,* and several foreign language and community newspapers, including *El Diario* (Spanish), *Il Progresso* (Italian), *Jewish Daily Forward, Jewish Amsterdam News,* the *Chinese Daily News,* the *Stuyvesant Town and District,* and the *Greenwich Village Voice.* The foreign language and community newspapers were included to insure that all ethnic groups and local communities in the affected area would receive notification of the hearing. The notices were placed in the newspapers twice a week for the two weeks prior to the hearing.

to his place of business than the proposed site of the PMC. His major concern was whether the proposed PMC would serve him as well as the present branch offices. The second witness, also a businessman who subscribed to WU Telex service and used the public message service only on rare occasions, was informed of the hearing by a sales representative from WUI, who had asked him to testify. The witness' primary concern was whether the proposed PMC would be able to handle the volume of traffic that would be diverted to it. A New York State Assemblyman, Stephen J. Solarz, who had wished to appear and testify at the hearing was unable to do so because of a state legislative commitment, but was allowed to express his views in writing as an official part of the record. Essentially, Assemblyman Solarz believes that the closing of public offices in New York City will further degrade service while causing additional hardships to the large segment of the public which must rely upon Western Union's public message service.

Section III

Discussion, Findings and Conclusions

30. The record before us concerning Western Union's proposal to substitute a new PMC facility for the 22 present branch offices in lower Manhattan, poses two basic questions for resolution: (1) whether the overall proposal would in general serve the public convenience and necessity, and (2) whether the discontinuance of any of the particular branch offices involved would adversely affect the public.

31. With respect to the first question, we think it clear, in light of the information contained in Western Union's applications, the evidence of record and the pleadings of the parties, that Western Union has shown reasonable justification for the general concept of consolidating numerous branch offices in lower Manhattan into a new PMC under existing circumstances. There is no dispute that the volume of counter acceptance traffic and the number of messages delivered by messenger have drastically declined over the past 20 years in New York City, while the configuration of branch offices has remained virtually unchanged (paragraph 8 above). Indeed, the sharp decline in this type of traffic is not endemic to New York City, but generally prevails throughout the nation. Aside from the large number of offices involved in a single application, and the novel nature of the substitute facility to be provided, the instant application is essentially similar to many other applications filed by Western Union over the years to discontinue public branch offices, with substitute service to be provided through another office in the community. Principally because of declining volumes in the public message service, and the declining public use of over-the-counter service in particular, the Commission by acting on individual applications has authorized Western Union to sharply reduce the number of branch offices in many cities.[8] Ten years ago the

[8] The Commission has also approved Western Union's overall plans to close hundreds of local offices where the substitute service is to be provided by a local agency. WU Public Office Closure, Docket 18908, 27 FCC 2d 787. Since January 1, 1968, the Commission, through its Telegraph Committee and upon recommendation of the Chief of the Common Carrier Bureau has granted formal applications to discontinue 57 branch offices in 22 cities. Some 30 such applications are currently awaiting action, not including the 22 offices involved in this proceeding. Additionally, approximately 20 informal applications to discontinue branches have been deemed granted in the 4-year period by meeting the criteria specified in Part 63.64 of the Commission's Rules.

company operated 450 such branch offices. Today the number of such offices is approximately 200, of which 102 are in New York City.

32. In addition to the conceded decline in counter acceptance and message volumes, there is no substantial refutation of Western Union's showings as to its staffing, service and facilities problems in maintaining multiple branch offices in the area of New York City involved here (paragraph 12 above); the potential advantages of centralized operation in a new, up-to-date PMC facility (paragraphs 10, 12); the interdependence between the PMC concept and Western Union's computer switching modernization program (paragraph 13); and the net annual savings to be anticipated from the lower Manhattan consolidation due to such factors as reduction of operator premium time, message switching costs, multiple real estate leases and office maintenance costs (paragraph 14).[9] We find ample warrant in the record for concluding that, given the present circumstances, whatever their underlying causes, some consolidation is not only appropriate but is indeed a practical necessity if Western Union's public message service to the general public in lower Manhattan is to be maintained or to stand any realistic chance for improvement. Moreover, we consider the establishment of a new, modern PMC with up-to-date equipment as the substitute facility to be a progressive step toward preservation of public message service, particularly for the benefit of those members of the public who cannot now obtain this type of service by any other means.

33. Those challenging Western Union's proposal do not really quarrel with the consolidated PMC concept *per se*, but rather urge principally that the discontinuance of some of the branch offices will inconvenience the public. Some also take issue with particular aspects such as the proposed location of PMC and the adequacy of the space in the new facility.

34. In considering whether to authorize the discontinuance of a Western Union branch office, the Commission generally endeavors to make reasonably certain that closure of the office would not unduly inconvenience telegraph patrons and that the alternate means of service proposed by Western Union will be adequate to serve the public in a satisfactory manner. In this connection, we customarily examine the size of the counter acceptance file; the distance these patrons would have to travel to file messages at the nearest open office or agency; the staff to be added, if any, at the substitute office; any protests that may be received; and the likely speed of service which will be rendered for the messenger delivery load diverted to the alternate office. With respect to delivery service we have generally expected Western Union to demonstrate by means of theoretical studies that the diverted messages will receive, on the average, equal service from the proposed substitute office, and that the combined load at the consolidated office will

[9] While the Commission ruled in 1950 that the circumstance that any particular office may be operating at a profit or a loss to Western Union is not determinative of the question of whether closure of that office will adversely affect the convenience and necessity of the public served by that office, the financial condition of particular offices is pertinent to the extent that it may have a bearing on Western Union's financial ability to provide adequate service both at that location and generally throughout the United States. *Report of the Commission in Docket No. 8088*, 14 FCC 447, pp. 455–456. Moreover, the fact that we are here concerned with a comparatively large number of branch offices in a relatively small geographic area lends added significance to the factor of financial condition.

be handled substantially within the company's origin to destination service objective.

35. In analyzing the service aspects of Western Union's proposal on the basis of the record herein, we will first give attention to the over-the-counter service situation. Assuming establishment of a PMC at 15 Maiden Lane to provide alternate service, six of the 22 offices proposed for closure would meet the requirements of Part 63.64 of the Rules for closure 60 days following the filing of informal applications. These offices are:

GROUP I

Office	Average daily load	Distance to 15 Maiden Lane (yards)
CH	26.7	266
DN	.8	
JB	8.9	
JT	12.7	
MP	10.0	
VU	3.9	

36. Section 63.64 of the Commission's Rules permits a telegraph carrier to file informal applications for authority to close branch offices located in communities served by another office of the company with the same or longer hours of service and equal or better pickup and delivery facilities, where the average total sent and received load at the office to be closed has not exceeded 50 messages per day for the preceding six months. If the traffic load has been in excess of 15 messages per day, the substitute office must be located within one quarter of a mile of the office to be closed to meet the requirements of the Rules. If the traffic load has averaged 15 messages or less per day, the substitute office need not be located within any specified distance so long as it is in the same community. Applications filed under this section of the Rules are deemed granted effective as of the 60th day following the date of filing unless the Commission notifies the carrier to the contrary on or before such date.

37. The foregoing rules were adopted by the Commission some 20 years ago. Since that time the Commission has gathered substantial experience with their application in the context of maintaining adequate public service. This experience has demonstrated that the standards reflected by such rules comport with fair and realistic service objectives and the interest of the public in the availability of adequate and acceptable telegraph service insofar as public office facilities are concerned. Thus, while these rules are not necessarily dispositive of the issues designated by the Commission in this proceeding, they nevertheless, in the absence of countervailing evidence, provide appropriate guidelines for testing the merits of the proposed office consolidations involved in this group of applications.

38. Except for office CH, all of the offices in Group I have an average daily message load of less than 15 messages per day, and hence do not fall within the distance requirement of Section 63.64. Since CH is only 266 yards from the new PMC, closure of this office will not result in

any substantial inconvenience to the customers involved. There appears to be no dispute as to the traffic volumes reported for these offices, and none of the parties to this proceeding has recommended their permanent retention. Accordingly, on the basis of this record, we find that the discontinuance of the Group I offices will have no substantial adverse effects on over-the-counter service to the public.

39. Other offices, which do not come within one or more of the criteria of Section 63.64, but which have relatively little use by the public of the counter facilities available, include:

GROUP 2

Office	Average daily counter load	Average per hour	Distance to PMC (miles)
BM 9a to 5p	[1] 18	2.2	0.8
BY 9a to 7p	27	2.7	.2
FW 9a to 5p	22	2.7	.4
FX 8a to 6p	7	.7	.4
FT 9a to 6p	10	1.1	.6
NNA 24 hours	30	1.3	.7
NF 9a to 5p	22	2.7	2.3
NH 9a to 5p	10	1.1	1.7
NJ 830a to 6p	11	1.2	2.4
SQ 8a to 12m	21	1.3	1.9

[1]At time of emergency closure.

Three of these offices (BY, FW and FX) are in close proximity to the proposed PMC, and customers of these offices will not be significantly inconvenienced by filing their messages at the PMC. In the areas served by the remaining seven offices in this group, which are in the northern part of lower Manhattan farthest away from the proposed PMC, there is obvious cause for concern that closure of these offices will deny to the public adequate counter acceptance facilities. We will therefore require the establishment of a minimum of three public acceptance agencies in this area. As previously stated, during the course of the hearing Western Union indicated its willingness to establish such agencies. Balancing the low volumes now being handled by these offices with the three acceptance agencies to be established, it is our conclusion that the proposed arrangement will adequately meet the public requirements for over-the-counter service, including money orders.

40. Because of the vital importance of adequate selection, training and supervision of agents to efficient agency operations, we will require Western Union to submit a showing as to how it intends to implement these agency additions in a satisfactory manner, prior to final action authorizing the discontinuance of the Group 2 branch offices. In this connection, we think there may be merit in the suggestion of NYPSC that the 9–B acceptance agency to serve the area now served by SQ should maintain the later hours currently maintained by that office, and will expect Western Union to consider this factor in making the showing described below. Location of the agencies shall be based on a detailed analysis of the originating load in the area, and mini-

mum hours of service on existing message filing patterns at the 10 branch offices north of Maiden Lane. Western Union will be required to provide full documentation in support of its agency selection, including maps, photographs and layouts, and in this instance meet all other requirements of Part 63 of the Rules governing the conversion of Class 1 offices to Class 9 or Class 11 agencies.

41. The major opposition of the CWA concerns the extent and quality of counter service to be available in the area north of Maiden Lane. The union urges retention of four existing branch offices, viz NNA, NH, NJ and SQ. As set forth above, we believe that the establishment and proper location and administration of three acceptance agencies to serve patrons now using these offices and others north of the PMC will adequately meet the public requirements for over-the-counter service. This action will also meet the recommendation of the New York Public Service Commission in this proceeding. Accordingly, we find that the retention of counter service at NNA, NH, NJ and SQ is not required by public convenience or necessity, and that the public will not be substantially inconvenienced by the discontinuance of such service at the Group 2 offices under the conditions specified above.

42. The remaining 6 offices in the 22-office group have moderate to substantial counter volumes, as illustrated below:

GROUP 3

Office	Average daily counter load	Average per hour	Distance to PMC (miles)
AX 9a to 5:30p	31	3.6	0.5
BW 9a to 5p	47	5.9	.4
CS 7a to 7p	70	5.8	.3
EQ 9a to 5p	58	7.2	.2
NW 8:30 a to 6:30p	116	11.6	.3
UJ 24 hours	334	18.8	.4

Of these, UJ branch, with an average daily acceptance load of 334 messages, shows by far the greatest public use of its over-the-counter facilities. The traffic is divided between international and domestic. In its Proposed Findings of Fact and Conclusions, WUI cites a WU study covering a 28-day period showing that about 70% of all international messages filed at the 22 offices are filed at UJ. Data in the record suggest that about ⅓ of the UJ counter load consists of international messages. WUI claims that closure of UJ would represent a severe disservice to international filers. However, on cross-examination, WUI's witness admitted that a public office maintained by RCA Global Communications, Inc., is less than a minute's walk from UJ office and that a public office maintained by ITT World Communications, Inc. is less than two minutes walking time from UJ. The witness also acknowledged that these offices are open 24 hours per day, 7 days a week. While WUI relies on Western Union's public offices under its present agreement with Western Union (due to expire in October 1973), we note that WUI would not be precluded from establishing its own public offices in New York City if that agreement is not renewed

or is so modified upon renewal and any necessary Commission authorization is obtained.[10] The situation with respect to Tropical is somewhat different as New York is not a gateway city for this carrier. However, no showing was made by Tropical as to the extent of traffic filed at the 22 offices routed via Tropical or estimates of traffic loss to that carrier if Western Union's application is granted.

43. While closure of the UJ office would not significantly affect customers of RCA Global Communications, Inc. and ITT World Communications, Inc., we are concerned with the high volume of domestic traffic filed over the counter at UJ office (something in excess of 200 per day), and the interests of international service users in the neighborhood who prefer to route their messages via WUI or Tropical, for which the nearest substitute facility would be the PMC approximately .4 of a mile distant. Additional traffic in the order of 78 messages per day originating in this general area is being filed at nearby AX and BW offices. In light of these volumes we believe that a public facility for acceptance of messages over the counter should be retained at or near the UJ location. Accordingly, we find that the public convenience and necessity would be adversely affected by this closure and will therefore deny that portion of the application requesting authority to discontinue UJ branch office. In view of the conclusions reached elsewhere herein with respect to service messenger pickup and delivery, the company will not be required to maintain such services at UJ.

44. With the retention of the UJ office as provided for above, there appears to be no need for retention of AX and BW, both of which have moderate over-the-counter volumes and which are located only 450 and 500 feet, respectively, from UJ office. With regard to the remaining three offices, CS, EQ and NW, these offices have a total combined average daily over-the-counter load of 244 messages. However, these offices are within a radius of .3 mile or less from 15 Maiden Lane. Considering this proximity and the absence of evidence that would indicate otherwise, retention of multiple counter facilities in such a small area is not needed to meet the public convenience and necessity, upon establishment of the PMC. While WUI urges retention of CS as well as UJ, the average daily counter load of CS (70) is substantially smaller than that of UJ (334), and the latter is a 24-hour office. Indeed, WUI itself has relied on the circumstance that about 70% of all international messages filed at the 22 offices are filed at UJ. Moreover, CS is slightly closer to the PMC than UJ. In light of these circumstances and the other factors cited above, and particularly in view of the retention of UJ, we find no compelling reason of public necessity for also retaining CS.

45. We will now turn attention to the message delivery and pickup service aspect of the proposal. Only 6 branches in the lower Manhattan group are designated as delivery offices to which messengers are normally assigned. These are:

[10] For the background relating to Western Union's present agreement with WUI, see *Western Union Divestment* (Docket No. 6517) 30 FCC 323, 336–337, 346–347 (1961).

Office	Average daily pickup and delivery load combined	Average per hour	Distance to PMC (miles)
BY 9a to 6p	326	36	0.2
CS 7a to 7p	1,256	105	.3
NJ 9a to 5p	131	16	2.4
NNA 24 hours	206	9	.7
SQ 8a to 12m	400	22	1.9
UJ 24 hours	446	18	.4

Apart from the comparatively small number of branch offices involved, it bears noting that for purposes of messenger pickup and delivery, unlike in the case of over-the-counter service, the distance between the new PMC and the branch offices proposed to be discontinued does not raise a question of public inconvenience in the sense that customers would be required to travel a greater distance to obtain service. The public would be prejudiced only in the event that the discontinuance of these branch offices adversely affected the speed of the pickup and delivery service by Western Union employees, or otherwise caused a delay in the provision of service to the customer's premises.

46. No comparative speed of service data was provided on the record to compare the existing speed of service that is now provided with the speed of service that is expected to result from the proposed consolidation. However, the company did offer evidence that 15 Maiden Lane is readily accessible to numerous subway and public bus routes. It also provided a delivery time analysis based on "worst case" situations that a messenger would encounter in reaching several diverse and outlying locations within the area in issues.[11] This analysis shows that the maximum travel time which normally could be expected from 15 Maiden Lane to the most remote location in the area (11th Avenue and 23rd Street) would not exceed 42 minutes. Test runs by Western Union indicated that travel time by public transportation from the PMC to the area served by SQ office (a heavy delivery office) is in the range of 30 to 35 minutes. Travel time to areas south of the proposed PMC were shown to be nominal. These studies were subjected to critical cross examination, and the company subsequently provided more detailed studies for the record confirming generally the earlier results. While the studies are not conclusive, they are indicative in general terms that the added travel times from the PMC will have no significant effects on overall service quality, in view of the offsetting factors discussed below.[12]

[11] W.U. Exhibit No. 3, Attachment 8.

[12] Until a few months ago and for many years thereto, Western Union's service goals were 60 minutes from time of filing to time of delivery or first attempt for messages delivered by telephone or tieline and 75 minutes for business messages delivered by messenger. These objectives were modified by changes in Tariff FCC 255 (p. 76) filed June 4, 1971, establishing time periods of four hours for messages delivered by telephone or tieline and six hours for messages delivered by messenger, except in New York City. The time periods for New York are six hours from time of filing for messages delivered in that city by telephone or tieline and eight hours for messages delivered by messenger. The New York City exceptions expire on June 4, 1972 unless sooner cancelled, changed or extended.

47. The record furnishes persuasive support for Western Union's contention that the consolidated PMC will entail operational improvements which should make messenger pickup and delivery service equal to or better than that existing under the present office configuration. All of the existing branch office personnel now assigned to the 22 branch offices, including messengers, will be reassigned to the PMC, plus any additional force that may be required to maintain around-the-clock operation. We think it reasonable to anticipate that the consolidation of the messenger employees at a single dispatching point will afford a larger and more flexible work force, make it easier for Western Union to handle the problem of messenger absenteeism, and facilitate improved messenger supervision. Moreover, the company plans to employ a radio-paging service as an aid in dispatching and controlling messengers. These operational improvements, which should permit faster, more efficient answering of message pickup calls and dispatching of delivery routes, should compensate materially for the additional messenger travel time. (See paragraphs 50–52 below.)

48. A further and potentially more important factor bearing on the speed of delivery service to the public is Western Union's planned phased replacement of electrical-mechanical reperforator tape switching by computer switching, a modernization program that is dependent upon the PMC concept. There was considerable testimony about operational problems and traffic delays being encountered with the Plan 38 switching system in the New York central office through which messages are switched to individual branch offices and tieline customers. The equipment is old and subject to frequent malfunction; it is not of modern design for optimum efficiency, and manual routing look-up is required for each message. Although the record is not conclusive as to the average time required for a message to pass through the central office, it does show the switching interval in January 1971 was on the order of 60 minutes. A company witness testified that even under the very best of conditions the switching interval on the average would be no less than 25 minutes. Nor does the record show clearly how much reduction in the present switching time can be achieved by the planned replacement of the manually operated Plan 38 system with automatic terminal computer switching. However, based on our observation of Western Union intercity traffic now being switched by computer, we think it reasonable to predict that with installation of computer switching for distribution of traffic in New York City, switching times will be in the order of a few minutes on the average. In the meantime consolidation of traffic into a few centralized offices will simplify routing at the Plan 38 positions and reduce transmission times. We believe that this reduction will offset generally the additional travel times that may be required in physical delivery or pickup of messages in areas distant from the PMC.

49. In light of all of the foregoing, including the relatively short distance between the PMC and three of the six pertinent branch offices to be discontinued (BY, CS and UJ—for messenger pickup and delivery purposes), the indicated advantages of a centralized mes-

senger force, the simplified routing of traffic to a consolidated office and ultimate integration of the New York terminal operation into Western Union's overall computer switching program which would be facilitated by the instant proposal, we find that messenger pickup and delivery service from the proposed PMC is likely to be equal to or better than that existing under the present office configuration.

50. In this connection, we stress that we regard it as a responsibility of the management of Western Union to assign messenger personnel to its various public telegraph offices in sufficient number to provide the telegraph-using public speedy and efficient pickup and delivery service. Thus, we will expect Western Union to maintain a continuing surveillance of messenger force requirements at the PMC, and to file reports on this aspect with the Commission. Moreover, we strongly urge Western Union to make the greatest use practicable of either a commercial radio-paging service or a company-operated system under appropriate FCC license for facilitating the pickup of messages, and expressly rely on Western Union's plan to incorporate this feature in the lower Manhattan operation.

51. We further emphasize that in our judgment the success of the proposed PMC on Maiden Lane, and others which may be authorized as a substitute for multiple branch offices, is largely dependent upon the willingness of Western Union to adequately staff the facility. In Docket No. 18270, et al., the Commission expressed substantial doubt as to whether the company assigns a sufficient work force to carry out its (service) responsibilities adequately.[13] Subsequent experience, as illustrated by declining speed of service,[14] frequent temporary closing of branch offices in New York City as reported to the Commission by Western Union, and the increasing number of service complaints reaching the Commission, suggests that the company continues to subordinate staffing requirements to cost control. Western Union is put on firm notice that operation of the initial PMC will be monitored closely, and that future authorizations of PMC's as substitute facilities for multiple branch offices will in a large measure depend upon the performance record of the initial installation.

52. In addition, we shall require, as a condition of the authorization to be issued herein, that prior to implementation of such authorization Western Union shall obtain written approval by this Commission of its staffing plan for the proposed PMC, based on a written submission by Western Union (with copies thereof served on all parties to this proceeding) setting forth the formula by which it will determine and maintain the number of messenger and non-messenger forces that will be utilized at the PMC to provide an adequate speed and quality of

[13] 27 FCC 2d, p. 546.

[14] As illustration of declining speed of service, monthly reports submitted by Western Union as prescribed in Part 64 of the Commission's Rules show that between February 1971 and February 1972 the weighted average origin to destination time nation-wide rose from 57.2 minutes to 81.3 minutes for messages delivered by telephone, from 56.0 minutes to 80.3 minutes for messages delivered by tieline, and for business messages delivered by messenger from 105.1 minutes to 123.6 minutes. In February 1972 the average origin to destination times for messages delivered in New York City was 102.2 minutes for telephone, 116.6 minutes for tielines and 149.2 minutes for messenger deliveries.

service. This showing shall include a full explanation of the production and service standards upon which the plan is premised, including the specific provisions made therein for absenteeism and unforeseen surges in traffic loads. We will also make it a condition that once an approved plan is placed in effect, there shall be no change in, or deviation from, the plan without prior written approval of the Commission upon submission herein of a written showing (with copies thereof served on all parties to this proceeding) as to the justification for such proposed change or deviation. To ensure that the foregoing formula and other conditions on the instant authorization are satisfactorily executed, this proceeding shall remain open subject to such further orders, approvals or authorizations as may be warranted.

53. Finally, with respect to various miscellaneous contentions of those challenging aspects of Western Union's application, we see no merit in WUI's proposal that the present branch office configuration be retained for at least one year following establishment of the PMC. With regard to WUI's allegation that the public is opposed to WU's proposal, adequate notice of the subject application and instant proceeding was given and opportunity afforded the public to present their views.[15] The lack of substantive complaints to the Commission and minimal response at the New York City hearing suggest little public concern with Western Union's plans to discontinue neighborhood branch offices. We believe it premature to consider WUI's request that Western Union be required to establish an office in the World Trade Center. This center, which is now only partially occupied, is still under construction and is located fairly close to the proposed PMC. Moreover, no evidence has been presented in this proceeding as to the public telegraph requirements of present or future occupants.

54. Western Union presented no direct testimony as to the extent the proposed consolidation may result in either a diminution or increase in the use of telegraph service. However, it is implicit throughout Western Union's direct case and pleadings that closure of the multiple branch offices will have no adverse effect on the use of telegraph service, and we have so found under the conditions specified herein. WUI contends the opposite is true, arguing that contraction of offices inherently results in lower volumes. On the basis of this record, and, particularly, the arrangements that are being made for service upon office consolidation, we do not share WUI's concern. On the contrary, it is reasonable to expect service improvement from these changes which, hopefully, will reverse current traffic trends.

55. Some of the parties further contend that 15 Maiden Lane is not the most propitious location for the PMC. Thus, CWA and WUI urge that the PMC should be located farther south closer to Wall Street financial community. The record shows that 15 Maiden Lane is geographically in the lower third of the area affected by the applica-

[15] The record shows in addition to newspaper publications and notices posted at each office, as required by Part 63.90 of the Commission's Rules, that upon filing of the application WU sent letters to all customers with a usage record of two messages or more per month notifying the customer that an application has been filed to discontinue his service branch office, with substitute service to be provided through the proposed PMC.

tion, but at the approximate telegraph load center for lower Manhattan below 24th Street.[16] In light of our requirement that Western Union add three acceptance agencies in the northern area and retain over-the-counter service at the UJ branch (located south of the proposed PMC), we find that the 15 Maiden Lane location represents a fair compromise between the optimum telegraph load and the geographic center of the area to be served.

56. The CWA in its Brief and Recommendations also expresses the view that the proposed PMC quarters at 15 Maiden Lane are not large enough for operating efficiency; pointing out that the entire office at ground floor level will be a maximum of 12 feet wide, and asserting that if the bulk of the telegraph counter business is to be channeled into this single location, it is not unreasonable to expect untoward congestion. The labor organization suggests that the company find more adequate space at a location closer to Wall Street.

57. Western Union in its Reply Findings does not directly respond to the allegation of insufficient space to be provided for public operations. However, a scale drawing of the proposed PMC submitted in the record shows that approximately 210 square feet will be available to accommodate counter patrons. Six bank-type teller windows along a counter curved at one end and approximately 30 feet in length will be provided. While, as the labor union also points out, the space for public use between the fronts of four of the windows and the arcade wall of the office will be only about 4 feet in width, with six positions available there should be minimal need for customer queuing. More substantial queuing space will be available in front of the remaining two windows nearest the customer entrance. Considering the size and overall layout of the office and number of acceptance windows, we believe that there will be sufficient space to handle the over-the-counter traffic diverted to the PMC.

58. However, we do question whether sufficient space and facilities are to be provided for delivery operations, in view of the substantial messenger delivery and pickup volumes to be handled by the PMC. The preliminary layout sketch (Exhibit 2, Attachment 7) shows only two send-out positions, which effectively limits the maximum number of delivery office clerks who can be assigned at any given time. Since no space accommodation for a tube clerk is evident, the delivery clerks will presumably be required to load and unload pneumatic tube carriers used to transport messages to and from the second floor operating room, as well as to make up routes, dispatch messengers and accept messages picked up by messengers. The adequacy of two positions to meet service requirements during normal business day and peak periods is not supported by data in the record. Therefore, we will require Western Union to review its personnel requirements for delivery clerk operations on

[16] The record shows that 75% of the combined acceptance and delivery traffic in the area affected by the application occurs at branch offices located within a radius of 2000 feet (.36 mile) of the proposed PMC. These branch offices are:

AX	CS	NW
BW	EO	MP
BY	FW	UJ
CH	FX	VU.

the basis of appropriate fall-of-load studies, and demonstrate to the Commission that achievement of it send-out objectives will not be impaired by any limit on assignment of non-messenger personnel imposed by space bounds.[17] This showing shall be made by Western Union as part of the PMC staffing plan it is to submit for Commission review and approval as ordered herein.

59. In summary, we find and conclude that subject to the terms and conditions specified herein, the public convenience and necessity would be served by authorizing the public message center proposed in Western Union's application TD–17972, and would not be adversely affected by the discontinuance of all of the branch offices listed in that application, except UJ for over-the-counter service, upon the establishment and operation of such public message center and three agency offices north of the PMC. Denial of the application with respect to UJ branch is warranted by the indicated extent of the over-the-counter demand in the area immediately surrounding that office. The establishment of the three counter acceptance agencies in the northern portion of the area involved is required by public convenience and necessity for the reasons and subject to the conditions set forth in paragraphs 39 and 40 above. None of the existing branch offices should be closed until the PMC and agency arrangements are completed, and the staffing plan has been approved by the Commission.[18]

Order and Authorization

60. Accordingly, IT IS ORDERED, pursuant to the provisions of Section 214 of the Communications Act and the Commission's Order of June 23, 1971 herein (FCC 71–651), That the application (TD–17972) filed by Western Union on March 22, 1971 IS DENIED insofar as the discontinuance of over-the-counter service at branch office UJ is concerned and IS OTHERWISE GRANTED UPON CONDITION that:

A. Western Union shall establish a minimum of three public acceptance agencies in the northern portion of the affected area;

B. Western Union shall submit the showings described in paragraphs 40, 52 and 58 herein with respect to its plans for implementing such acceptance agencies, for staffing the proposed public message center, and for providing satisfactory space and facilities for delivery operations at the public message center;

C. Western Union is not authorized to discontinue any of the offices involved in application TD–17972 until after such plans

[17] A company witness testified in answer to a question by counsel for the Bureau that the objective at the PMC with respect to answering pickup calls and sending out delivery groups would be to dispatch a messenger either with a delivery or for a pickup within three minutes of the time that the message or pickup call is received at the delivery position, with a maximum of six minutes (Tr. 1400).

[18] Upon consideration of the Petition to Reopen Record, filed by WUI on May 25, 1972, and Western Union's opposition thereto, filed on May 30, 1972, we are of the opinion that the petition should be denied. WUI's allegations, even if true, would not alter the substance of our findings and conclusions herein. Moreover, reopening the record to adduce evidence as to the events alleged by WUI and Western Union's asserted defenses, would delay conversion to the new PMC which we have found, under the conditions here specified, is necessary in the public interest and should result in improved service to the public.

have been approved in writing by the Commission, and the public message center and agency arrangements have been completed; and

D. Western Union shall not change or deviate from the staffing formula approved by the Commission without prior written approval of the Commission.

IT IS FURTHER ORDERED, That the Petition to Reopen Record, filed by Western Union International on May 25, 1972, IS DENIED.

IT IS FURTHER ORDERED, That this proceeding shall remain open subject to such further orders, authorizations or approvals as may be warranted.

BERNARD STRASSBURG,
Chief, Common Carrier Bureau.